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# The Administration of the Death Penalty in South Carolina: Experiences over the First Few Years

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# THE ADMINISTRATION OF THE DEATH PENALTY IN SOUTH CAROLINA: EXPERIENCES OVER THE FIRST FEW YEARS*

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I. INTRODUCTION ..... 247
II. PREVIOUS RESEARCH ..... 255
A. *Arbitrariness and Discrimination Under Pre-*Furman *Statutes* ..... 255
B. *Discrimination Under Post-*Furman *Statutes* 262
C. *Arbitrariness Under Post-*Furman *Statutes* .. 272

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III. CAPITAL SENTENCING IN SOUTH CAROLINA: METHODOLOGY ..... 277
*A. Universe of Cases* ..... 277
*B. Data Sources* ..... 279
*C. Decision Points to be Analyzed* ..... 282
IV. CAPITAL SENTENCING AND RACIAL DISCRIMINATION IN SOUTH CAROLINA: EMPIRICAL FINDINGS ..... 283
*A. Prosecutor Behavior* ..... 283
*1. Preliminary Findings* ..... 283
*2. Regression Analysis of Racial Discrimination and the Charging Decision* 294
*3. Overall Aggravation Analysis of Racial Discrimination* ..... 315
*B. Capital Sentencing* ..... 321
*1. Preliminary Findings* ..... 323
*2. Regression Analysis of Racial Discrimination and the Sentencing Decision* 329
V. CAPITAL SENTENCING AND ARBITRARINESS IN SOUTH CAROLINA ..... 335
*A. Introduction* ..... 335
*B. Conducting a Search for Comparatively Excessive Death Sentences: An Empirical Approach* ..... 339
*C. Comparative Capital Sentence Review in South Carolina: Methodological Issues* ..... 344
*D. Comparative Capital Sentence Review in South Carolina: Empirical Results* ..... 349
*1. Salient Features Analysis of Comparatively Excessive Death Sentences* 352
*2. Main Determinants Analysis of Comparatively Excessive Death Sentences* 361
*3. Overall Culpability Analysis of Comparatively Excessive Death Sentences* 368
*E. Comparative Capital Sentence Review in South Carolina: The Theory and Methodology of the State Supreme Court* ..... 375
*F. Adequacy of the South Carolina Supreme Court's Theory and Practice of Proportionality Review* ..... 389
*G. Parameters of an Adequate System of Proportionality Review* ..... 393

VI. ACCEPTANCE OF EMPIRICAL DATA ON ARBITRARINESS AND DISCRIMINATION IN CAPITAL SENTENCING BY THE COURTS ..... 396
A. *The Treatment of Arbitrariness and Discrimination Claims in the South Carolina Supreme Court* ..... 396
B. *The Treatment of Arbitrariness and Discrimination Claims in Federal Courts* .... 399
C. McCleskey v. Kemp *and the Supreme Court's Analysis of Discrimination and Arbitrariness Evidence in Capital Sentencing Systems* .... 401
VII. CONCLUSION ..... 405

## I. INTRODUCTION

South Carolina's current death penalty statute was enacted on June 8, 1977. This Act of 1977 is actually an amended version of an earlier, mandatory capital punishment statute that the South Carolina General Assembly passed in 1974 but that the United States Supreme Court declared unconstitutional in *Woodson v. North Carolina*[1] and *Roberts v. Louisiana*.[2] The Act of 1977, as the state supreme court refers to it,[3] is modeled after Georgia's capital punishment statute, which the Court approved in *Gregg v. Georgia*.[4] Similar to Georgia's death penalty scheme, South Carolina's Act is a guided discretion statute which focuses the discretion of the sentencing authority on aggravating and mitigating circumstances.[5] To impose a sentence of death, the sentencing authority must find at least one aggravating circum-

1. 428 U.S. 280 (1976).
2. 428 U.S. 325 (1976).
3. State v. Rodgers, 270 S.C. 285, 288, 242 S.E.2d 215, 216 (1978).
4. 428 U.S. 153 (1976). In State v. Shaw, 273 S.C. 194, 199, 255 S.E.2d 799, 802, *cert. denied*, 444 U.S. 957 (1979), the state supreme court noted that "[o]ur present death penalty statutes, Section 16-3-20 through Section 16-3-28 . . . were enacted as Act No. 177 of the 1977 Acts of the General Assembly. Act No. 177 of 1977 was patterned after the death penalty statutes of our sister state Georgia." Later in the decision it reiterated this similarity: "The statutory death penalty complex adopted by the General Assembly in 1977 is constitutionally indistinguishable from the statutory complex approved by the United States Supreme Court in *Gregg*." *Id.* at 203, 255 S.E.2d at 803-04.
5. Georgia's death penalty statute is somewhat different from South Carolina's statute—the Georgia statute provides an enumeration of aggravating circumstances, but no mitigating factors, GA. CODE ANN. § 17-10-30(b)(1982), while the South Carolina statute enumerates both. S.C. CODE ANN. § 16-3-20(C)(a),(b) (Law. Co-op. Supp. 1987).

stance beyond a reasonable doubt.[6] It may, however, impose a

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6. The requirement of finding an aggravating circumstance beyond a reasonable doubt restricts the discretion of the sentencing authority only in a limited way. South Carolina cases have established that the finding of an aggravating circumstance serves only as a threshold element. *See, e.g.*, State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied*, 463 U.S. 1229 (1983). Once an aggravating circumstance is affirmatively found and a case is thereby pushed into the "death eligible" realm, the sentencing authority is free to consider non-statutory factors in aggravation. When the state supreme court first reviewed the new statute in *Shaw*, the court noted that the statute "makes no provision for the consideration . . . of any non-statutory aggravating circumstances," but nonetheless allowed the State to enter into evidence photographs of post-mortem abuse which were not included in the statute's list of aggravating circumstances. 273 S.C. at 201, 255 S.E.2d at 802. In expanding the relevance of aggravating factors, the court theorized that the non-statutory factors have a logical connection to the offense at hand and that the sentencing authority should be free to consider all factors that bear on the offender or offense:

> The pre-sentence hearing is for the introduction of *additional* evidence in extenuation, mitigation or aggravation of punishment. . . . [T]he sentencing authority is required to consider all the evidence received at the guilt determination stage regarding the circumstances of the crime and the characteristics of the individual defendant together with *additional* evidence, if any, in extenuation, mitigation or aggravation of punishment.

*Id.* at 208, 255 S.E.2d at 806 (emphasis in original).

The threshold function served by the finding of one statutory aggravating circumstance was approved by the United States Supreme Court in Zant v. Stephens, 462 U.S. 862 (1983). The Supreme Court held that the sentencing authority could rely in part on non-statutory aggravating circumstances if a statutory aggravating factor was found. In *Zant* the jury found three aggravating circumstances. While Stephens's appeal was pending, the Georgia Supreme Court invalidated one of the three circumstances in Arnold v. State, 236 Ga. 534, 540, 224 S.E.2d 386, 391 (1976). In reviewing Stephens's claim that the inclusion of a non-statutory aggravating circumstance may have played a role in the jury's decision to impose a death sentence, the Georgia Supreme Court held that the sentence could stand on the basis of the other legitimate aggravating circumstances. Zant v. Stephens, 250 Ga. 97, 100, 297 S.E.2d 1, 4 (1982), *certified question conformed to*, 462 U.S. 862 (1983). The Georgia Supreme Court likened the pool of homicide cases to a pyramid divided by three planes: the first plane separates murder cases from other homicides, while the second plane, established by the finding of a statutory aggravating circumstance, defines murders in which the death penalty *may* be imposed. Once the second plane is crossed, "the case enters the area of the factfinder's discretion, in which all the facts and circumstances of the case determine . . . whether or not the case passes the third plane and into the area in which the death penalty is imposed." *Id.* In accepting this role of the aggravating circumstance, the United States Supreme Court noted that "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Zant*, 462 U.S. at 874.

This view of a statutory aggravating circumstance announced by the Court in *Zant* was adopted by the South Carolina Supreme Court in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, *cert. denied*, 467 U.S. 1265 (1984). In *Plath* the trial judge submitted to the jury the aggravating circumstance of "assault with intent to ravish," a charge omitted from appellants' original sentencing trial. *Id.* at 18, 313 S.E.2d at 629. Rejecting the ar-

life sentence without explicitly finding factors in mitigation. In addition, like its Georgia counterpart, South Carolina's capital punishment statute calls for automatic review by the state supreme court to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[7]

South Carolina's death penalty statute was revised to bring it into compliance with the requirements of *Furman v. Georgia*.[8] *Furman* struck down existing capital punishment statutes allowing standardless juries because the *product* of capital sentencing schemes violated the eighth amendment.[9] Decided by a

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gument that the submission of this aggravating circumstance was prejudicial error, the court noted that appellants could have been sentenced to death from the independent finding of kidnapping as an aggravating circumstance at the sentencing rehearing. The additional aggravating circumstance of "assault with intent to ravish" was merely cumulative: "A jury must find at least one statutory aggravating circumstance or the death penalty shall not be imposed. . . Additional aggravating circumstances provide only alternative bases for placing a defendant in the category of persons subject to capital punishment." *Id.* at 19, 313 S.E.2d at 629 (citations omitted).

7. S.C. CODE ANN. § 16-3-25(C) (Law. Co-op. 1985).

8. 408 U.S. 238 (1972).

9. Only Justices Brennan and Marshall held that capital punishment was a per se violation of the eighth amendment prohibition against cruel and unusual punishment. Brennan based his objection on the arbitrariness of capital sentencing, arguing that the infrequency of death sentences in comparison to the number of homicides reflected "little more than a lottery system." *Id.* at 293. Justice Marshall rested his per se objection on empirical evidence that capital punishment had been used in a discriminatory fashion against blacks and the poor. *Id.* at 364-66. Justices White, Douglas, and Stewart, while holding that the death penalty is not invalidated per se by the eighth amendment, voted to strike down existing statutes because of the sentencing patterns they produced. To Justice Stewart, the existing death sentencing schemes were unconstitutional because they were so capriciously imposed that there was no rational basis to distinguish between defendants sentenced to death and those whose lives the state had spared. *Id.* at 306-10. The infirmity of capital sentencing procedures, according to Justice White, was that the infrequency of death sentences frustrated the achievement of legitimate state objectives—deterrence and retribution. *Id.* at 310-14. Justice Douglas objected to discretionary capital punishment statutes because they were both "pregnant with discrimination" and arbitrary. *Id.* at 257.

The Court in *Furman* voted to strike down existing capital punishment statutes

5-4 vote expressed by nine separate opinions, *Furman* probably lacks a firm doctrinal holding.[10] Nonetheless, a consistent objection to standardless capital sentencing expressed in *Furman* and other cases is the absence of evenhandedness.[11] An absence of evenhanded sentencing results from: (1) the capricious or freakish imposition of a death sentence in a small number of cases selected from a much larger number of similar cases, and (2) the systematic application of capital punishment to identifiable groups (race, gender, or social class). In the first category evenhandedness is not achieved because similar cases are treated differently without a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[12] In the second, a lack of evenhandedness results because defendants who have committed similar

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based on Furman's eighth amendment attack on the pattern of death sentences only a year after it approved identical statutes reviewed under a fourteenth amendment due process claim in McGautha v. California, 402 U.S. 183 (1971). Weisberg noted in a recent article that, in reviewing *Furman* immediately after *McGautha*, "the Justices could take advantage of the wonderful fiction that the Due Process Clauses and the Eighth Amendment might have very different things to say about standardless sentencing." Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315 (1984).

10. For a lucid discussion of the Justices' positions in *Furman* and subsequent cases, see Weisberg, *supra* note 9.

11. This theme is expressed in several Supreme Court cases. In *Furman* Chief Justice Burger noted that "[t]he decisive grievance of the [concurring] opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice." 408 U.S. at 398-99 (Burger, C.J., dissenting). Justices in subsequent cases reiterated the central infirmity of the discretionary capital statute reviewed in *Furman*. Justice Stewart noted that "*Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153, 188 (1976). In Lockett v. Ohio, 438 U.S. 586 (1978), Burger restated his position in *Furman* that, "to comply with *Furman*, sentencing procedures should not create 'a substantial risk' that the death penalty will 'be inflicted in an arbitrary and capricious manner.' " *Id.* at 601 (quoting *Gregg*, 428 U.S. at 188). The Court in Zant v. Stephens, 456 U.S. 410, *certified question answered by* 250 Ga. 97, 297 S.E.2d 1 (1982), *answer to certified question conformed to*, 462 U.S. 862 (1983), announced a similar understanding of *Furman:* "In [*Gregg*], we upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate to a significant degree the concern of [*Furman*] that the death penalty not be imposed capriciously or in a freakish manner." *Id.* at 413. Later the Court stated that "excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in *Furman*." California v. Ramos, 463 U.S. 992, 1000 (1983). Although *Furman* had no majority opinion, a consistent theme emerges from the opinions; it is not "a badly orchestrated opera, with nine characters taking turns to offer their own arias" as Weisberg describes the case. Weisberg, *supra* note 9, at 315.

12. 408 U.S. at 313 (White, J., concurring).

crimes are treated differently because of some personal attribute. Three of the majority opinions in *Furman* (Justices Brennan, White, and Stewart) referred to the capricious and arbitrary nature of standardless capital sentencing, while two others (Justices Marshall and Douglas) objected to patterns of discrimination.[13]

The absence of evenhanded sentencing, while generally not unconstitutional in noncapital cases,[14] was a fatal infirmity in *Furman* in part because the death penalty "differs from all other forms of criminal punishment, not in degree but in

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13. *See supra* note 9. *See Generally* Gross and Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984). In *Zant* the Court noted the concern of *Furman* "that the death penalty not be imposed capriciously or in a freakish manner." 456 U.S. at 413. In *Gregg* the Court stated that, to comply with *Furman*, sentencing procedures should not create "a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." 428 U.S. at 188. The Court also stated that judicial review would ensure that any death sentence was not influenced by prejudice. *Id.* at 198. In addition, there is a subtle interweaving of the arbitrariness and discrimination objections to standardless capital sentencing in *Furman*. Justice Douglas noted that standardless juries were "pregnant with discrimination." 408 U.S. at 257. He also objected to the capricious nature of such sentencing, stating that "[u]nder these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12." *Id.* at 253. Justice Stewart, who objected to standardless juries on arbitrariness grounds, nonetheless suggested that capricious sentencing practices may be due to discrimination: "My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. [citation omitted]. But racial discrimination has not been proved, and I put it to one side." *Id.* at 310.

14. In previous cases the Court has held that a lack of proportionality in noncapital cases does not violate the Constitution. In Rummel v. Estelle, 445 U.S. 263 (1980), the Court held that imposing a life sentence on a defendant after a third nonviolent conviction did not violate the eighth amendment. The Court in *Rummel* conceded that certain unusually extreme sentences for relatively minor criminal violations might be so disproportionate as to violate the eighth amendment, but noted that "successful challenges to the proportionality of particular sentences" should be "exceedingly rare." *Id.* at 274. The Court in Hutto v. Davis, 454 U.S. 370 (1982), reaffirmed *Rummel*, stating that proportionality review should be restricted to death penalty cases and cases involving unusual punishments, and that federal judicial deference should be paid to duly authorized penalties.

This stance changed somewhat one year after *Hutto* when the Court held that a life sentence without parole imposed on a defendant convicted of six prior felonies under a state habitual offender provision was unconstitutionally disproportionate to the crime. Solem v. Helm, 463 U.S. 277 (1983). Justice Powell, writing for a 5-4 majority, noted that the eighth amendment's ban on cruel and unusual punishment extends beyond capital and barbaric punishments to include "sentences that are disproportionate to the crime committed." *Id.* at 284.

kind."[15] Because *Furman* lacked any real holding, it provided little guidance to states wishing to maintain the death penalty as a criminal sanction. It was clear, however, that revised capital punishment statutes, at least on their faces, had to minimize the risk of capricious and discriminatory sentencing to pass constitutional scrutiny. In his dissenting opinion, Chief Justice Burger suggested that this could be done either by "providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed" and making the sentence mandatory upon conviction.[16] South Carolina initially opted for the second alternative in its death penalty statute enacted in 1974. As mentioned earlier, the Court struck down this and other mandatory statutes in *Woodson* and *Roberts*. The General Assembly then passed a revised statute on June 8, 1977, which was similar to Georgia's guided discretion statute approved in *Gregg*.

The 1977 Act was designed, then, to remedy the fatal defect of standardless capital sentencing—a lack of evenhandedness—in both its capriciousness and its discrimination. In approving the Georgia statute, the United States Supreme Court noted that two of its features—articulated standards to guide and structure the jury's decision making, and appellate review—would provide greater evenhandedness:

> In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*.[17]

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15. 408 U.S. at 306 (Stewart, J., concurring). Long before *Furman*, however, the Supreme Court recognized that the death penalty is constitutionally different from noncapital penalties. Reid v. Covert, 354 U.S. 1, 77 (1957); Williams v. Georgia, 349 U.S. 375, 391 (1955); Stein v. New York, 346 U.S. 156, 196 (1953); Andres v. United States, 333 U.S. 740, 752 (1948).

16. 408 U.S. at 400.

17. Gregg v. Georgia, 428 U.S. 153, 198 (1976).

The Court also believed that articulated standards would remedy capriciousness and discrimination at other points in the administration of the death penalty. Not only would such standards inform the jury's decision, but they would trickle down to guide prosecutorial discretion as well: "Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence."[18] Similarly, in reviewing for the first time its revised capital sentencing scheme—which is "constitutionally indistinguishable from the statutory complex approved . . . in *Gregg*,"[19]—the South Carolina Supreme Court alluded to the same two features as promising to remedy the defects of its pre-*Furman* statute:

> The guidance provided by the sentencing procedures reduces the likelihood that the sentencing authority will impose a sentence of death capriciously. Additionally, the requirement that the sentencing authority specify the factors it relied upon in reaching its decision ensures that meaningful appellate review will be available to every capital defendant.[20]

The defects of *Furman*, then, are to be remedied by guiding the discretion of prosecutors and juries with statutory aggravating and mitigating circumstances, and by explicitly monitoring the pattern of sentencing decisions through appellate review.

When the Court approved the Georgia statute in *Gregg* and the state supreme court approved the 1977 Act in *Shaw*, neither court had any data on the effect that the procedural revisions actually would have on the administration of capital punishment. Rather, the *Gregg* Court simply approved the Georgia statute on its face.[21] The Court later noted in *Zant v. Stephens* that it "upheld the Georgia death penalty statute because the standards and procedures set forth therein *promised to alleviate* to a significant degree the concern of [*Furman*], that the death

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18. *Id.* at 225.

19. State v. Shaw, 273 S.C. 194, 203, 255 S.E.2d 799, 804, *cert. denied*, 444 U.S. 957 (1979).

20. *Id.*

21. "On their face these procedures seem to satisfy the concerns of *Furman*." 428 U.S. at 198.

penalty not be imposed capriciously or in a freakish manner."[22] In dismissing petitioner's claim in *Gregg* that the revisions of the Georgia statute were "only cosmetic"[23] and "unsupported by any facts,"[24] Justice White had no available "facts" of his own to support his belief that the procedural revisions would provide the evenhandedness lacking in *Furman*. The statutory changes promised to produce evenhanded justice, but the Court suggested that their constitutional validity would be determined by the extent to which this promise was fulfilled.[25]

Similarly, when it first affirmed the 1977 Act, the South Carolina Supreme Court had no empirical data of its own to guide its constitutional scrutiny. It simply affirmed by analogy, noting that the South Carolina statute is "constitutionally indistinguishable" from the statute in *Gregg*.[26] Thus, the South Carolina Supreme Court, like the Court in *Gregg*, approved the new death penalty statute on its face because newly enacted procedural revisions promised to alleviate those problems condemned in *Furman*. This Article concerns this central issue. It examines empirical data from South Carolina on the administration of capital punishment during the first few years of the new statute. Generally, it analyzes the extent to which the procedural revisions in the 1977 Act fulfill the promise of *Shaw*—that the death penalty in South Carolina be imposed in an evenhanded manner. Before presenting the design and methodology of this research, it is first helpful to review the available social science literature on this question.

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22. 456 U.S. 410, 413 (emphasis added), *certified question answered by* 250 Ga. 97, 297 S.E.2d 1 (1982), *answer to certified question conformed to*, 462 U.S. 862 (1983).

23. 428 U.S. at 198.

24. *Id.* at 225.

25. 456 U.S. at 413.

26. State v. Shaw, 273 S.C. 194, 203, 255 S.E.2d 799, 803-04, *cert. denied*, 444 U.S. 957 (1979). Before reviewing each of appellant's specific objections to the statute, the court noted that the Supreme Court had approved Georgia's statute in *Gregg*. It then considered "whether [South Carolina's] statutory death penalty procedure is sufficiently similar to Georgia's procedure to pass constitutional scrutiny." *Id.* at 199, 255 S.E.2d at 802. The court paid particular attention to the guidance provided by the aggravating and mitigating factors enumerated in the statute and to the statutory mandatory sentence review, the features to which the Supreme Court alluded in *Gregg*.

## II. PREVIOUS RESEARCH

### A. *Arbitrariness and Discrimination Under Pre-*Furman *Statutes*

Long before *Furman*, a characteristic feature of capital punishment in America was its infrequency in comparison with the number of capital crimes committed. In a comparison of several states over various time periods, Sellin found that the likelihood of a defendant being convicted and sentenced to death was quite remote.[27] For example, he reported that in Massachusetts for the years 1931-1950 a murder defendant faced a 29% risk of being convicted and a 4.2% risk of being sentenced to death.[28] In California during 1950-1975, of 7,053 adult males convicted of felonious homicide, 4,632 (65.7%) had been convicted of murder, 2,026 (28.7%) had been convicted of capital murders and 434 (6.1%) had been sentenced to death.[29] In Texas from 1946-1967, 139 out of 4,893 defendants (2.9%) convicted of murder received a death sentence.[30] In fact, of the many tens of thousands of capital offenses that occurred during 1850-1967, available data indicate that there have been fewer than 6,000 state-sponsored executions.[31] It was this very infrequency that prompted Justice Brennan in *Furman* to describe the imposition of the death penalty in America as "little more than a lottery system."[32]

Not only does the empirical data suggest that relative to the number of capital crimes the number of death sentences under pre-*Furman* statutes were few, it also reveals that those sentences handed down were disproportionately imposed on black defendants. One of the first reports of racial disparity in capital sentencing was Mangum's 1940 study of capital clemency

27. T. SELLIN, THE PENALTY OF DEATH 35-53, 69-74 (1980).
28. *Id.* at 70.
29. *Id.* at 71.
30. *Id.* at 72.
31. W. BOWERS, LEGAL HOMICIDE 45-48 (1984).
32. 408 U.S. at 293. After conducting an empirical analysis of his own, Justice Brennan observed that both the number of executions and death sentences were small and decreasing relative to the number of capital crimes, which were increasing. *Id.* at 291-92. This empirically based observation led him to conclude that "[w]hen a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied." *Id.* at 293.

during the 1920s and 1930s in nine southern and border states.[33] He reported that, in every state, commutations were more likely for white offenders than for black offenders. In 1941 Guy Johnson hypothesized that the effect of the offender's race depended upon the victim's race and that previous studies may have underestimated race-of-offender differences in capital sentencing. He reported data from North Carolina which showed that the likelihood of a death sentence among those indicted for criminal homicide was highest for blacks who killed whites and lowest for whites who killed blacks.[34] Johnson also examined the commutation process in a sample of North Carolina cases during 1933-1939. His analysis of this data suggested that Mangum may have understated the magnitude of racial discrimination in the commutation process.[35]

A more detailed study of capital sentencing was reported in 1949 by Garfinkel, whose data on over 800 homicide cases covered 10 North Carolina counties during 1930-1940. Garfinkel found racial disparity by both race-of-offender and race-of-victim at various points in capital sentencing. Blacks who killed whites were more likely (a) to be indicted for first degree murder, (b) to be charged with first degree murder given indictment, and (c) to receive a sentence of death.[36] He found similar but much more dramatic differences for victim's race: blacks who killed whites were about nine times more likely to be sentenced to death than blacks who killed blacks.[37]

Later studies confirmed these early results. Elmer Johnson examined data on commutations and executions in North Carolina during the period 1909-1954.[38] He found a disparity in execution rates according to offender's race for several offenses (murder, rape, burglary) and a disparity according to victim's race for rape. Johnson did not examine the joint effect of victim's and offender's race on the likelihood of a defendant's execution.[39] Although most of the research on racial discrimination

33. C. MANGUM, THE LEGAL STATUS OF THE NEGRO 369 (1940).
34. Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941).
35. *Id.* at 100.
36. Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 Soc. FORCES 369, 371-75 (1949).
37. *Id.* at 374.
38. Johnson, *Selective Factors in Capital Punishment*, 36 Soc. FORCES 165 (1957).
39. *Id.* at 166, 169.

and capital punishment was conducted in the South, similar patterns of racial disparity were found for New Jersey,[40] Ohio,[41] Maryland,[42] and Pennsylvania.[43] Evidence of discrimination by the social and economic status of the defendant was found for California.[44]

Although a great deal of empirical evidence available by the end of the 1960s indicated that the sentencing patterns under *Furman*-like, full discretion statutes were characterized by arbitrariness and discrimination, much of this research was merely suggestive rather than conclusive. Virtually all of the studies in the published literature presumed that observed racial differences in the charging, sentencing, and execution of black defendants (or killers of whites) were due to racial discrimination. Even substantial differences in the way homicides are legally processed, however, may be because the kinds of crimes committed by or against different racial groups are different in important, legally relevant ways. For example, capital crimes committed by blacks (or against whites) may be more brutal or may include either another felony or more victims than those committed by whites (or against blacks). The criminal records of black offenders may be more extensive and may include more violent crimes than those of whites, making blacks more culpable in the eyes of decision makers in the death sentencing system. Important qualitative differences in the homicide event or in the offender, therefore, may account for the observed racial differences. The appropriate methodology for assessing the extent of racial discrimination in capital sentencing is to examine racial differences after first controlling for these legally relevant components of capital crimes. Most of the early researchers did

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40. Wolf, *Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey: 1937-1961*, 19 RUTGERS L. REV. 56 (1964).

41. OHIO LEGISLATIVE SERVICE COMMISSION, CAPITAL PUNISHMENT, STAFF REPORT No. 46 (1961).

42. MARYLAND LEGISLATIVE COUNCIL, COMMITTEE ON CAPITAL PUNISHMENT, STAFF REPORT (1962).

43. Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIMINOLOGY & POL. SCI. 301 (1962); Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227 (1976).

44. Carter & Smith, *The Death Penalty in California: A Statistical and Composite Portrait*, 15 CRIME & DELINQ. (1969); Special Issue, *A Study of the California Penalty Jury in First Degree Murder Cases*, 21 STAN. L. REV. 1297 (1969).

not account for these possible differences when conducting their analyses or when interpreting their data.

A few of the early death penalty studies did, however, offer some minimal controls for legally relevant factors. In his North Carolina research, Garfinkel[45] examined only those cases that resulted in first degree murder indictments. In their study of execution and commutation rates for 439 black and white defendants convicted of first degree murder in Pennsylvania between 1914 and 1958, Wolfgang, Kelly, and Nolde employed more rigorous controls for legally relevant factors. They separately examined nonfelony homicides (those not occuring during commission of another felony) and felony homicides (homicides occurring during commission of a felony such as burglary, armed robbery, kidnapping, or rape) and considered the role of the offender's age, occupation, marital status, county of origin, and type of counsel. They reported evidence of offender-based racial discrimination for both felony and nonfelony homicides which did not disappear when the other factors they examined were controlled singly.[46]

Two other pre-*Furman* studies offered much more rigorous controls for legally relevant factors. One was reported in the *Stanford Law Review* in 1969.[47] Its data set consisted of all California homicide cases during the years 1958-1966 in which the defendant had been convicted of first degree murder and sentenced by a bifurcated jury. In examining the effect of the victim's and the offender's race on sentencing decisions, the Stanford study simultaneously controlled for various characteristics of the offender, offense, and evidence. In all, over fifteen legally relevant factors were controlled through the statistical technique of partial correlation analysis.[48] The authors reported that, once

45. Garfinkel, *supra* note 36.

46. Wolfgang, Kelly & Nolde, *supra* note 43.

47. Special Issue, *supra* note 44.

48. In partial correlation analysis the magnitude of the relationship between two events (*e.g.*, race and the imposition of the death penalty) is expressed in a correlation coefficient. This "zero-order" correlation coefficient varies between zero and plus or minus 1.0 with the magnitude reflecting the strength of the relationship, without considering the possible influence of any other factor. Partial correlation analysis examines the effect of the introduction of other variables on the original zero-order correlation coefficient. In the example at hand, factors such as the number of offenders and victims, and the brutality of the offense are statistically examined along with race and the imposition of the death penalty. Using this method, we can see what happens to the magnitude of

these factors were taken into account, the jury's decision to impose a death sentence was independent of both the race of the offender and victim.[49] When the victim's and the offender's race were considered together, the study reported that "whites who killed whites fared no better and blacks who killed whites no worse than the average defendant in these cases."[50] Although no bias by the race of the defendant was found in the California data, the social class effect was significant. Even after simultaneously controlling for several offense and offender characteristics, the Stanford study reported that blue collar defendants were significantly more likely to be sentenced to death than white collar defendants.[51]

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the race-death penalty relationship when other factors are considered ("partialled out"). As is often the case, the introduction of legally relevant factors reduces the magnitude of the original zero-order relationship between race and imposition of the death penalty. These other variables are then said to have accounted for the race-death penalty correlation. If the zero-order relationship is substantially reduced when these other factors are controlled then the effect of race is said to be due to the operation of these other factors rather than racial discrimination itself. If the magnitude of the zero-order relationship persists, however, then the conclusion is that racial considerations continue to have an effect on the imposition of the death penalty even when these other factors are "controlled," or taken into consideration.

49. Special Issue, *supra* note 44, at 1367-76.

50. *Id.* at 1367.

51. The zero-order correlation between white defendant and a death sentence was +.10. After controlling for 37 aggravating factors, the partial correlation was reduced to .000. For black defendants the zero-order correlation was -.049 and the partial was reduced to .011 after controlling for 31 other variables. For white victims the zero-order and partial correlations were +.101 and .04 respectively, while for black victims they were -.05 and +.12 (with 25 and 29 variables controlled, respectively). In all of these cases the partial correlation was nonsignificant. For social class, the partial correlation for blue collar workers was nonsignificant, but for white collar workers it remained statistically significant. Even when over a dozen aggravating factors were considered simultaneously, the data indicated that California juries were disinclined to sentence white collar defendants to death. *Id.* at 1368-79.

The failure of the Stanford study in comparison with most of the other published literature to find any racial difference in the imposition of the death penalty may reflect the spuriousness of racial differences previously reported in the literature. Observed racial disparities may have been due to legally relevant differences in the offenders, the offenses, or both, which are considerably reduced or eliminated when such factors are controlled (as in the Stanford study). The failure of the study to show racial discrimination may also reflect a jurisdictional difference. With few exceptions, most of the research that demonstrates racial discrimination in capital sentencing has been conducted in Southern states. States without a cultural legacy of slavery and racism, such as California, may not harbor a climate that fosters or tolerates discrimination along racial lines. Finally, the Stanford study considered the end point of the capital sentencing process—the jury's decision to impose a death sentence. If substantial racial discrimination

The data on capital sentencing by California juries published in the Stanford study were re-analyzed by Baldus and his colleagues (Baldus) who revealed a second source of unfair capital sentencing under pre-*Furman* statutes—arbitrariness.[52] The Baldus study examined four cases drawn from the 239 pre-*Furman* murder cases in the Stanford study data set in which a death sentence was imposed. They then compared death sentencing rates in the group of murder cases found comparable to each of the four selected cases.[53] Baldus found that, in two of the four cases examined, the sentence of death was comparatively excessive because most defendants in the pool of "similar cases" did not receive a death sentence (fewer than 25% of the similar cases resulted in a death sentence).[54] Of all 102 California murder cases that resulted in a death sentence, approximately 20% were imposed in cases for which the death sentencing rate in the group of similar cases was less than 50%,[55] suggesting that in these cases "there [was] no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not."[56]

In addition to the Stanford study, Wolfgang and his colleagues (Wolfgang) conducted a statistically sophisticated series

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existed at earlier points in the process, it may be obscured at later points where greater "evenhandedness" appears. This is the problem of sample selection bias in sentencing research and will be discussed in more detail later. *See generally* Berk, *An Introduction to Sample Selection Bias in Sociological Data*, 48 AM. SOC. REV. 386 (1983); Klepper, Nagin & Tierney, *Discrimination in the Criminal Justice System: A Critical Appraisal of the Literature*, 2 RESEARCH OF SENTENCING: THE SEARCH FOR REFORM (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983); Thomson & Zingraff, *Detecting Sentencing Disparity: Some Problems and Evidence*, 86 AM. J. SOC. 869 (1981).

52. Baldus, Pulaski, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980).

53. The various methods of comparative sentence review will be described later in greater detail. Briefly, Baldus used three methods: (a) an overall culpability measure which estimates the overall aggravation level of each of the 239 murder cases in terms of a cumulative score with "similar cases" selected on the basis of overall score comparability; (b) a fact-specific main determinants method by which cases are matched on the basis of the factors determined by regression procedures to be the best predictors of jury sentencing behavior; and (c) a salient features method which selects similar cases by identifying the aggravating and mitigating factors upon which the prosecutor relied. *Id.* at 38-62.

54. *Id.* at 38-52.

55. *Id.* at 64-68.

56. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

of studies of rape and the death penalty.[57] Wolfgang collected data on approximately 3,000 convicted rape defendants in selected counties in seven southern and border states for the years 1945-1965. The data revealed a strong racial disparity in sentencing defendants to death for rape, both in rapes that occurred with another felony and in those that did not: "Whether or not a contemporaneous offense has been committed, if the defendant is black and the victim is white, the defendant is about eighteen times more likely to receive the death penalty than when the defendant is in any other racial combination of defendant and victim."[58] The greater likelihood that blacks who raped whites would be sentenced to death persisted when over two dozen possible factors were considered separately.

Wolfgang conducted a much more methodologically rigorous re-analysis restricted to 361 rapes committed in twenty-five Georgia counties from 1945-1965.[59] In this re-analysis the authors simultaneously controlled for fourteen factors thought to influence the sentencing of rape defendants. They reported that, even with these aggravating factors controlled, black offenders who raped white women in Georgia were significantly more likely to be sentenced to death than defendants in any other racial combination.[60]

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57. Wolfgang & Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS 119 (1973) [hereinafter Wolfgang & Riedel (1973)]; Wolfgang & Riedel, *Race, Rape and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658 (1975) [hereinafter Wolfgang & Riedel (1975)].

58. Wolfgang & Riedel (1973), *supra* note 57, at 132.

59. Wolfgang & Riedel (1975), *supra* note 57.

60. *Id.* at 666. In 1968, four years before *Furman*, part of the Wolfgang southern rape data was presented in a federal habeus corpus action in which a black man was accused of raping a white woman. Maxwell v. Bishop, 257 F. Supp. 710 (E.D. Ark. 1966), *aff'd*, 398 F.2d 138 (8th Cir. 1968), *vacated*, 398 U.S. 262 (1970). Although Maxwell's fate was ultimately decided on other, *Witherspoon* grounds, the Eighth Circuit addressed but was not convinced by the racial discrimination evidence. Judge (later Justice) Blackmun observed:

> We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this. But. . .improper state practice of the past does not automatically invalidate a procedure of the present.

398 F.2d at 148. Although the Eighth Circuit did not base its decision to grant Maxwell relief on an affirmative showing of racial discrimination in the Arkansas statute, two years after *Maxwell* was vacated Justice Powell in his *Furman* dissent alluded to the evidence of discrimination in southern rape cases: "discriminatory application of the

The pre-*Furman* empirical literature on the effect of race on capital sentencing suggests that, in accord with Justice Douglas' characterization, these full discretion statutes were "pregnant with discrimination."[61] Evidence in the 1940s and 1950s indicated that black offenders in capital cases were more likely than whites to be indicted, to be given a death sentence, and to be executed, particularly when blacks committed the offense against whites. In addition, many death sentences apparently were inflicted capriciously—for crimes of comparable severity a death sentence was imposed in only a minority of cases.[62] This risk of capricious and discriminatory capital sentencing led the Court to strike down full discretion statutes in *Furman*, and to introduce greater legal formality into subsequently constructed state capital sentencing procedures.[63]

### *B. Discrimination Under Post-*Furman *Statutes*

State legislatures attempted to remedy the arbitrariness and discrimination evident under pre-*Furman* statutes with procedural reforms which the Supreme Court approved in *Gregg*,[64] *Proffitt v. Florida*,[65] and *Jurek v. Texas*.[66] As noted earlier, the two procedural reforms expected to remedy the defects identified in *Furman* were: (1) statutory aggravating and mitigating circumstances which would serve as guides to structure the discretion of both prosecutor and jury;[67] and (2) appellate review

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death penalty in the past, admittedly indefensible, is no justification for holding today that capital punishment is invalid in all cases in which sentences were handed out to members of the class discriminated against." 408 U.S. at 450 (Powell, J., dissenting). In addition, the Solicitor General of the United States in his amicus curiae brief in *Gregg* was persuaded by the pre-*Furman* data on rape and capital punishment: "we do not question its conclusion that during the 20 years in question, in southern states, there was discrimination in rape cases." Brief for the United States as Amicus Curiae app. A. at 5a, Gregg v. Georgia, 428 U.S. 153 (1976) (No. 74-6257).

61. 408 U.S. at 257 (Douglas, J., concurring).

62. Baldus, Pulaski, Woodworth & Kyle, *supra* note 52.

63. For an excellent review of several important post-*Furman* cases and the Court's attempt and ultimate failure to introduce the rule of law into capital sentencing, see Weisberg, *supra* note 9, and Winick, *Dark Year on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, *and* Harris, 17 U.C. DAVIS L. REV. 689 (1984).

64. 428 U.S. 153 (1976).

65. 428 U.S. 242 (1976).

66. 428 U.S. 262 (1976).

67. 428 U.S. at 224-225.

by a court of statewide jurisdiction to ensure that no death sentence is (a) factually incorrect, (b) the product of prejudice or passion, or (c) disproportionate to sentences issued in similar cases.[68] Despite the Court's optimism in *Gregg* and its companion cases that procedural reform would remedy the infirmity condemned in *Furman,* post-*Furman* social scientific evidence which brings into question the efficacy of such reform has begun to accumulate.

In one of the first studies of post-*Furman* capital sentencing patterns, Bowers and Pierce examined sentencing outcomes in Florida, Texas, and Georgia.[69] Bowers and Pierce separated felony from nonfelony murders. In their analysis, they found substantial victim-based racial disparity in the issuance of death sentences. In Florida for felony murders, killers of whites were over six times more likely to receive a death sentence than were those who killed blacks. Although the study revealed no overall race-of-offender effect, black killers of whites were particularly disadvantaged: they were over seven times more likely to be sentenced to death than were blacks who murdered other blacks.[70] The Bowers and Pierce data also suggested that Georgia's procedural reforms were not entirely successful in ridding death sentence decisions of racial influences. Killers of whites in Georgia felony murders were over five times more likely to receive a death sentence than were those who slayed blacks. Moreover, blacks who killed whites were over seven times more likely to receive a death sentence than were blacks who killed blacks.[71] Bowers and Pierce found a pattern similar to that reported for Florida and Georgia in their Texas data.[72]

Florida's post-*Furman* capital sentencing scheme has been particularly well-studied, with research published by Zeisel,[73] Radelet,[74] and Arkin.[75] Zeisel examined Florida homicide data

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68. See text accompanying *supra* note 17.

69. Bowers & Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).

70. *Id.* at 599.

71. *Id.*

72. *Id.*

73. Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

74. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981).

75. Arkin, *Discrimination and Arbitrariness in Capital Punishment: An Analysis*

during the period 1976-1977; his data partially overlaps the Bowers and Pierce data.[76] He reported that, in felony homicides, killing a white substantially escalated a defendant's chances of receiving a death sentence.[77] Zeisel's data also showed a race-of-offender and race-of-victim effect: 47% of black-on-white killings resulted in a death sentence, while 24% of white-on-white killings and only 1% of all black-on-black killings resulted in a sentence of death.[78]

Radelet analyzed data on over 600 homicide indictments in twenty Florida counties between 1976 and 1977. Similar to the conclusions of Bowers and Pierce, and of Zeisel, Radelet found that killers of whites were over two and one-half times more likely to be sentenced to death than were killers of blacks.[79] Radelet found that the racial disparity resulted because killers of whites were almost twice as likely to be indicted for first degree murder than were those who killed blacks.[80]

Arkin examined 350 murder cases presented to the Dade County Florida grand jury for a first degree murder indictment for the years 1973-1976. He reported no significant overall racial effect in the probability of a death sentence for a felony murder for either the race of the offender or victim.[81] Arkin's study stands alone in post-*Furman* research in failing to find a racial pattern in the imposition of Florida death sentences. Arkin's reported findings, however, must be read with some caution. First, his data base is somewhat small, containing only 29 black-victim homicides and 113 white-victim homicides, thus making the probability of a Type II error more likely.[82] Second, upon closer

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*of Post-*Furman *Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75 (1980).

76. Bowers & Pierce, *supra* note 69.

77. Zeisel, *supra* note 73, at 459-461.

78. *Id.* at 459.

79. Radelet, *supra* note 74, at 922.

80. *Id.*

81. Arkin, *supra* note 75. Arkin did report, however, that killers of whites in felony murders were significantly more likely to be convicted of first degree murder than were killers of blacks. *Id.* at 90. He also noted, without full explanation or documentation, however, that "other factors account for part of the difference. A greater proportion of the killings with white victims involved female or multiple victims." *Id.* at 94. Arkin did not conduct, and probably could not conduct given his small sample size, a multivariate analysis to determine if a racial difference existed after controlling for the gender and number of victims.

82. A Type II statistical error occurs when the researcher makes a mistake and

inspection, Arkin's data actually reveals a moderately large racial effect: blacks who killed whites were more likely than killers of blacks to be convicted, to be convicted of first degree murder, and to be sentenced to death.[83] Finally, Arkin's initial data set consisted of a pool of first degree murder indictments; his cases already had passed through one filter—the prosecutor's charging decision. Studies conducted in Florida[84] and other southern states[85] indicated that the prosecutor's decision to charge a homicide was influenced by the race of the victim, of the offender, or of both. Racial discrimination at this stage may very well obscure evidence of discrimination at the sentencing stage.[86] This problem of sample selection bias in sentencing research, which was alluded to earlier, may, in part, account for Arkin's unique findings.[87]

The data from these early studies suggest that post-*Furman* procedural reforms of capital punishment statutes apparently have not been successful in eliminating one of the infirmities condemned in *Furman*—racial disparity.[88] Although these stud-

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fails to reject a false null hypothesis. In this instance the null hypothesis states that the decision to impose a death sentence is independent of either the race of the defendant or victim. A small sample size, then, may lead one to accept a hypothesis of no racial effect in capital sentencing when one actually exists, but is undetected because the researcher only has a few cases of the available total to analyze.

83. Arkin, *supra* note 75, at 89.

84. *E.g.*, Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985).

85. *E.g.*, Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984).

86. *See* Baldus, Woodworth & Pulaski, *supra* note 85; Bowers, *supra* note 84; Paternoster, *supra* note 85; Radelet & Pierce, *supra* note 84. A similar point was made recently by Gross & Mauro, *supra* note 13.

87. *See* Klepper, Nagin & Tierney, *supra* note 51; Thomson & Zingraff, *supra* note 51.

88. Riedel examined the race of offenders sentenced to death under pre- and post-*Furman* statutes in 28 states. His data set consisted of 493 defendants on death row as of December 31, 1971, and 376 offenders given a death sentence in a three and one-half year period after *Furman*. He reported that the proportion of black offenders under sentence of death increased from 53% of all death row defendants during the pre-*Furman* period to 62% during the post-*Furman* period. Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-*Furman *and Post*-Furman, 49 TEMP. L. Q. 261, 276 (1976). Riedel's data cannot be taken as unequivocal evidence of greater racial discrimination under post-*Furman* statutes,

ies consistently reveal victim-based racial disparities, the reported data is not conclusive evidence of discrimination, since differences in handling white- and black-victim capital crimes may reflect legally relevant and important differences in the crimes committed. Before any more definitive statements can be made about racial discrimination under post-*Furman* capital statutes, the influence of these legally relevant factors should be examined.

All of the studies discussed in this section attempted to control for the felony circumstances of the homicide. This methodological control is important because homicides of whites were more likely than homicides of blacks to be felony rather than nonfelony murders.[89] Controlling for the felony circumstances of a capital offense, however, is not enough to rule out the possible influence of other legally permissible differences between white- and black-victim cases. Felony homicides themselves differ in important ways which may vary by the race of the victim. In addition, it is not enough to consider these other factors one at a time; the preferred solution would be to control *simultaneously* for these influences.

A few post-*Furman* studies did control simultaneously for several of these factors, and the results are instructive. Radelet[90] controlled for both the felony circumstances of the homicide and the relationship between the victim and offender. Noting that

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since a large majority of the post-*Furman* homicides were felony murders and because other studies conducted during the post-*Furman* era report a moderately strong relationship between the offender's race and the commission of a felony homicide. *E.g.*, Arkin, *supra* note 75; Bowers & Pierce, *supra* note 69; Gross & Mauro, *supra* note 13. In his Appendix, however, Riedel reports evidence from six states, consistent with other post-*Furman* studies, which reveals that a disproportionate number of post-*Furman* death sentences were for white-victim homicides. Riedel, *supra*, at 285-286.

89. In Bowers and Pierce's Florida data approximately 60% of the black-on-white homicides were felony homicides, while only 8% of the black-on-black homicides were felony homicides. In all, 25% of the white-victim homicides were felony murders, while only 9% of all black-victim homicides were felony murders. Their Georgia data were almost identical: 52% of the black-on-white homicides were felony murders, compared with 8% of black-on-black murders; and 25% of all white-victim homicides, but only 9% of those with black victims, were felony murders. Bowers & Pierce, *supra* note 69, at 599. Arkin's data from South Florida, Gross and Mauro's data from Georgia, and Paternoster's data from South Carolina, all show that a larger proportion of white-victim than black-victim homicides were felony murders. Arkin, *supra* note 75; Gross and Mauro, *supra* note 13; Paternoster, *supra* note 85.

90. Radelet, *supra* note 74.

homicides of strangers (non-primary homicides) were more aggravated than those of acquaintances (primary homicides), and that a majority of first degree murder indictments were felony murders, Radelet reported that non-primary white-victim homicides that resulted in a first degree indictment were 1.65 times more likely to result in the death penalty than were comparable black-victim homicides.[91] In a related analysis of the indictment decision, Radelet also found that, when controlling for the victim-offender relationship, defendants accused of killing whites were more likely than accused killers of blacks to be indicted for first degree murder rather than for a lesser charge.[92]

Gross and Mauro conducted a detailed investigation of capital sentencing patterns under post-*Furman* statutes in Georgia, Florida, and Illinois.[93] They reported that killers of whites were more likely to be sentenced to death were than killers of blacks, particularly if the offender was black.[94] This race-of-victim effect persisted when they controlled for the following: the felony circumstance of the homicide, the victim-offender relationship, the number of victims, the gender of victim, and the type of weapon.[95] They reported that all four factors had an effect on the imposition of the death penalty in each state.[96] When these factors were controlled one at a time, however, the effect of the

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91. *Id.* at 922.

92. *Id.* at 924.

93. Gross & Mauro, *supra* note 13.

94. For all homicides in Georgia, killers of whites were almost ten times more likely to be sentenced to death than were killers of blacks. White-victim homicides were approximately eight times more likely to result in a death sentence in Florida, and approximately six times more likely in Illinois. *Id.* at 55. A black who killed a white was twenty-five times more likely to be sentenced to death than a black who killed another black in Georgia, twenty times more so in Florida, and twelve times more so in Illinois. *Id.* at 56.

95. For felony murders the ratio of white-victim death sentences to black-victim death sentences was five to one in Georgia, four to one in Florida, and approximately three to one in Illinois. *Id.* at 57. Blacks who killed whites under felony circumstances were six times more likely in Georgia, five times more likely in Florida, and almost three times more likely in Illinois to be sentenced to death than were those who killed whites. *Id.*

96. *Id.* at 58-61. Homicides of white victims by strangers were almost eight times more likely in Georgia, twelve times more likely in Florida, and four times more likely in Illinois to result in a death sentence than homicides of black victims. In multiple victim homicides, those who killed at least one white victim were four times more likely in Georgia, twice as likely in Florida, and over three times more likely in Illinois to be sentenced to death. *Id.*

victim's race was reduced in some cases, but not eliminated.[97]

Finding that none of these variables taken separately could explain the observed race-of-victim disparity in capital sentencing rates, Gross and Mauro then examined their combined effect. In this respect their work was an important advance over previous capital sentencing studies because it offered simultaneous controls for several nonracial aggravating factors.[98] Gross and Mauro used two techniques to examine the effect of nonracial variables on race-of-victim sentencing disparity. First, they classified each homicide by the number of nonracial aggravating factors present. Second, they conducted a multiple regression analysis, while simultaneously controlling for a list of aggravating factors, and estimated the effect of victim's race.[99]

In the first of these analyses Gross and Mauro classified each homicide according to the three aggravating factors most strongly associated with the likelihood of receiving a death sentence: the existence of a felony circumstance, the victim and offender relationship, and the number of victims. Each homicide received an aggravation score that ranged from zero, if none of the three factors were present, to three for those homicides with a contemporaneous felony, an offender who was a stranger to the

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97. *Id.* at 61-64.

98. *See* Radelet, *supra* note 74 and accompanying text. In his multivariate analysis Radelet controlled for only the felony circumstance of the homicide and the victim and offender relationship.

99. Multiple regression analysis is a statistical technique that allows a researcher to separate and estimate the unique effects of several explanatory (independent) variables on a single outcome (dependent) variable. The procedure fits an assumed mathemetical model to the data by using an equation that posits an outcome variable as a function of the explanatory variables. The unique effect estimated for each explanatory variable is the effect of that variable on the outcome variable after first controlling for all of the other explanatory factors. The regression equation used in this study includes as explanatory variables the victim's race and other nonracial legally relevant variables; the probability of a death sentence is the outcome variable. If the estimated effect for victim's race is statistically significant, then legally relevant factors probably explain the racial disparity. Other factors not included in the mathematical model (equation) may explain the disparity. As more of these factors are explicitly excluded from the equation and the race-of-victim variable continues to have a significant effect on the outcome variable, however, the researcher becomes more confident that the disparity is a true "racial effect" and is not due to some other, excluded factor. For a more complete discussion of multiple regression in legal research, see BALDUS & COLE, STATISTICAL PROOF OF DISCRIMINATION (1980); Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980).

victim, and multiple victims.[100] They found that accused killers of whites were more likely to receive a death sentence than were accused killers of blacks at each level of aggravation.[101] In homicides of the two highest aggravation levels, for which the great majority of death sentences were imposed, killers of whites were eleven times more likely to receive a death sentence than were killers of blacks in Georgia, almost four times more likely in Florida, and three times more likely in Illinois.[102]

Gross and Mauro replicated these results in their regression analyses. The probability of a death sentence was regressed on five explanatory variables: felony circumstances, victim-offender relationship, number of victims, gender of the victim, and type of weapon. A best model was fit for each state. Gross and Mauro found that, even with these legally relevant variables statistically controlled, "the race of the victim had a sizable and statistically significant effect on the odds of an offender receiving a death sentence."[103] For example, using this regression model, the predicted probability of an offender receiving the death penalty for a hypothetical highly aggravated homicide of a white was .653, but was reduced to .025 for an identical offense committed against a black.[104]

Baldus conducted an even more detailed study of Georgia's post-*Furman* capital sentencing system.[105] The Baldus study is the most comprehensive analysis of racial discrimination under a "procedurally reformed" capital statute and was offered at an evidentiary hearing in *McCleskey v. Zant*.[106] To estimate the effect of the victim's race on the decision to sentence a defendant to death, it estimated regression models that included over 200

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100. As expected the composite aggravation scale was strongly related to the likelihood of receiving a death sentence in each state. In Florida, Georgia, and Illinois, the death penalty was imposed in less than 10% of the cases at aggravation levels zero and one, but at the highest level of aggravation 57% of the cases in Georgia, 44% in Florida, and 23% in Illinois resulted in the death penalty. Gross & Mauro, *supra* note 13, at 71.

101. *Id.* at 74.

102. *Id.*

103. *Id.* at 78.

104. *Id.* at 80.

105. Baldus, Woodworth & Pulaski, *supra* note 85; Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

106. 580 F. Supp. 338 (N.D. Ga. 1984), *rev'd on other grounds sub nom.* McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), *aff'd*, ___ U.S. ___, 107 S. Ct. 1756 (1987).

legally relevant variables thought to influence the sentencing decision. Even with this large number of variables controlled, it reported that the victim's race still had a statistically significant effect—killers of whites were more likely to be sentenced to death.[107] Baldus also examined white- and black-victim sentencing rates after controlling for the culpability score of each homicide. The culpability score was based upon the presence of eighteen aggravating and mitigating factors. Among accused killers of comparable culpability, killers of whites were from two to four times more likely to be sentenced to death than were killers of blacks.[108]

In an earlier but related analysis of a subset of these data, Baldus estimated a regression equation which simultaneously controlled for over 150 aggravating and mitigating factors, and the analysis revealed that killers of whites were significantly more likely to be sentenced to death.[109] Baldus also classified each case according to the number of statutory aggravating factors present and reported that, in comparing sentences received in comparably aggravated cases, a death sentence was more likely to be imposed if a white were killed at the middle range of homicide aggravation.[110] Further evidence comes from Bowers' analysis of capital sentencing in Florida. Bowers conducted a multiple regression analysis on data from 191 defendants convicted of first degree murder during 1973-1977. He examined the effect of over ten legally relevant factors and found that, even when these variables were controlled, a death sentence was more likely to be issued in white-victim than in black-victim homicides in Florida.[111]

The studies by Radelet, Gross and Mauro, Baldus, and Bowers all have shown that, even when numerous aggravating, mitigating, and evidentiary variables were simultaneously controlled, killers of whites were more likely to be sentenced to death than were killers of blacks. Comprehensive studies of post-*Furman* statutes have also focused on critical decision points other than sentencing, notably, the prosecutor's charging

107. 580 F. Supp. at 366.
108. Baldus, Woodworth & Pulaski, *supra* note 85, at 1401.
109. Baldus, Pulaski & Woodworth, *supra* note 105, at 707.
110. *Id.* at 708.
111. Bowers, *supra* note 84, at 1083-85.

decision.

In an analysis of 594 Georgia cases in which defendants were found guilty at trial, Baldus examined the likelihood that the prosecutor would seek a death sentence in comparable white- and black-victim homicides. Classifying each homicide according to the number of statutory aggravating factors present, he found that prosecutors were substantially more likely to seek the death penalty in homicides of white victims at all but the highest levels of aggravation.[112] This led him to conclude that "Georgia is operating a dual system, based upon the race of the victim, for processing homicide cases. . . . [T]he level of aggravation in black victim cases must be substantially greater before the prosecutor will even seek a death sentence."[113] In a later study using the same data, but estimating the comparability of cases by using a culpability index which calculated a summary "aggravation score" based upon eighteen factors, Baldus again reported that Georgia prosecutors were more likely to seek a death sentence in a white-victim homicide than in a comparable black-victim homicide, particularly at the low ranges of homicide aggravation.[114]

Bowers investigated prosecutorial behavior in the twenty-county Florida data discussed previously.[115] In a multiple regression analysis he examined the effect of victim and offender racial combinations on the likelihood of a first degree homicide indictment. Bowers reported that, even with the effects of ten aggravating and mitigating factors controlled, defendants who killed white victims were more likely to be indicted for first degree murder.[116] Radelet and Pierce recently conducted a more extensive analysis of the prosecutor's charging decision in Florida capital cases.[117] They examined the charges in approximately 1,400 homicide cases from 1973-1977 from 32 Florida counties and compared the description of the homicide (either felony or nonfelony) in the initial police report with its description in the court record. They found that prosecutors were more likely to

112. Baldus, Pulaski & Woodworth, *supra* note 105, at 709.
113. *Id.* at 709-10.
114. Baldus, Woodworth & Pulaski, *supra* note 85, at 1403.
115. *See* Zeisel, *supra* note 73.
116. Bowers, *supra* note 84, at 1073.
117. Radelet & Pierce, *supra* note 84.

upgrade and less likely to downgrade white-victim homicides, particularly those committed by blacks.[118] Upgrading occurs when a homicide described in the police report as nonfelony becomes a possible felony homicide in the court record. Radelet and Pierce found this pattern of selectively upgrading white-victim and black-on-white homicides even after statistically controlling for seven legally relevant influences on the prosecutor's charging decision.[119]

### *C. Arbitrariness Under Post-*Furman *Statutes*

Racial discrimination is but one element of the unfair capital sentencing condemned in *Furman*. *Furman* also forbids arbitrary and capricious capital sentencing, which occurs when "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[120] Few pre-*Furman* studies dealt explicitly with arbitrary and capricious capital sentencing; most focused instead on racial discrimination.[121] Once *Furman* held that, to be constitutionally acceptable, capital sentencing statutes must also produce death sentences that can be explained rationally, studies explicitly investigating this issue were undertaken.

One of the first studies to be published was Arkin's analysis of 142 felony murders committed in Dade County, Florida. These data constituted a subset of his data set discussed earlier.[122] Of the 142 felony homicides, 54 resulted in a first degree murder conviction, and 10 ultimately resulted in a death sentence. Arkin compared the 10 felony first degree murder cases that resulted in a death sentence with the remaining 44 cases in which the defendant was convicted of first degree murder but was sentenced to life. In a somewhat subjective comparison of the case files of the 10 death and 44 life cases, Arkin reported that 24 of the 44 (55%) cases resulting in a life sentence presented a "clear distinction," 14 (32%) presented a "debatable

118. *Id.* at 600.

119. *Id.* at 608.

120. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

121. The only empirical analyses of arbitrary sentencing under pre-*Furman* statutes were the studies by Zimring, Eigen & O'Malley, *supra* note 43, and Baldus, Pulaski, Woodworth & Kyle, *supra* note 52.

122. Arkin, *supra* note 75 and accompanying text.

distinction," and 6 (14%) presented "no distinction" from the death cases.[123]

Baldus[124] and Barnett,[125] both using Baldus's Georgia data in separate studies, conducted much more detailed analyses of arbitrariness in post-*Furman* capital sentencing. In the first of his publications Baldus compared the sentences received by 594 defendants tried and sentenced for murder under Georgia's post-*Furman* death statute. These cases produced 607 sentencing decisions, 113 of which were death sentences. The authors found that: (a) only 22% of all defendants statutorily eligible for the death penalty actually were sentenced to death;[126] (b) for the group of most aggravated cases, which had three or more statutory aggravating circumstances, only 62% received a death sentence;[127] (c) 26% of the death sentences were imposed in cases in which the death sentence ratio for defined similar offenses (a case-specific measure) was less than .35;[128] and (d) employing an overall culpability measure of similar cases, 13% of the death sentences were imposed in cases in which the rate for comparable cases was .35 or less.[129]

Baldus also analyzed a second data set from Georgia for capriciousness in capital sentencing. This data set included over 500 homicides committed in Georgia between 1979 and 1981. He calculated the overall culpability of each homicide,[130] classified each case into one of six culpability levels, and estimated the death sentencing rate within each level. At the three highest culpability levels (which included 16% of the homicides and 71% of the death sentences), 84% of the cases resulted in a death sentence. Cases in the three lowest culpability levels (containing 29% of the death sentences and 84% of the homicides) resulted in death sentences 6% of the time; thirty-three death sentences

123. *Id.* at 95.

124. Baldus, Pulaski & Woodworth, *supra* note 105; Baldus, Woodworth & Pulaski, *supra* note 85.

125. Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985).

126. Baldus, Pulaski & Woodworth, *supra* note 105, at 698.

127. *Id.* at 699.

128. *Id.* at 703; *see id.* at 681-92 (discussion of this case-specific measure of comparable sentences).

129. *Id.* at 704.

130. Baldus, Woodworth & Pulaski, *supra* note 85, at 1383-88.

were imposed.[131] Baldus concluded that in this data set approximately one-half of the death sentences could not be described as evenhanded.[132]

Barnett re-analyzed this set of Georgia data using a slightly different method of case comparability.[133] He first classified each case on three dimensions: (1) the certainty that the killing was deliberate; (2) the victim and offender relationship; and (3) the vileness of the killing. He then scored each homicide according to the number of characteristics present and estimated death sentence rates among comparable homicides. Barnett reported that slightly more than one-third of the Georgia death sentences were handed down in cases in which the death sentencing rate in comparable cases was less than 35%; these figures closely correspond with those reported by Baldus.[134] In sum, at least in those states in which the issue has been empirically examined, a lack of evenhandedness in its second form—arbitrariness—appeared to remain a pervasive element of procedurally reformed post-*Furman* capital sentencing schemes.

The preceeding discussion of post-*Furman* capital sentencing focused on one form of arbitrariness—that produced when defendants who have committed comparable homicides receive qualitatively different sentences. A different, but related, form of arbitrary sentencing under post-*Furman* statutes occurs when defendants who have committed comparable homicides are given different sentences depending upon where in the state the offense was committed. Presumably, a state statute has state-wide applicability and its evenhanded administration, therefore, should not produce substantial variations across court jurisdictions or geographical regions within the same state. Moreover, the Supreme Court in *Gregg* suggested that evenhanded capital sentencing requires uniform application of a statute throughout

131. *Id.* at 1396.

132. *Id.* at 1399.

133. Barnett, *supra* note 125.

134. Barnett's conclusion is derived from a reconstruction of Barnett's Table 1. *Id.* at 1342. This table reports the number of cases from each cell and the probability of a death sentence for that cell. The product of those two gives the raw number of death sentences in each cell. Counting the number of death sentences in those 11 cells in which the probability of a death sentence is .35 or lower reveals 37 of 113 death sentences (37/113 = .327 or approximately 33%). For a verification of Barnett's Table 1, see Baldus, Woodworth & Pulaski, *supra* note 85, at 1395.

a state. In approving the Georgia statute, the Court alluded to the role of the state supreme court in enforcing the similarity standard that "no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally."[135] In spite of this intended standard, empirical research suggests that arbitrariness in the form of geographical variations in capital sentencing prevails under reformed sentencing schemes.

In their early study of Georgia and Florida, Bowers and Pierce observed that the likelihood of a death sentence for a felony homicide varied dramatically according to the region in the state where the crime was committed. Defendants in the panhandle of Florida, for instance, were almost five times more likely to be sentenced to death than those who committed crimes in South Florida counties. In Georgia, felony murders in the central or southwest region of the state were almost nine times more likely to result in a sentence of death than those in the Atlanta metropolitian area.[136] Bowers and Pierce's finding of substantial geographic variation in the probability of a death sentence in Florida and Georgia, however, may reflect only variations in the kinds of homicides committed in different regions of each state. Although they examined only felony homicides, thereby controlling for the felony circumstance of the offense, these homicides, as noted earlier, may vary in other important ways which may account for the observed geographical variation.[137]

Bowers's examination of Florida and the Baldus study of post-*Furman* capital sentencing in Georgia both provided a more detailed examination of this issue. After controlling for ten legally relevant aggravating and mitigating factors and for the race of both the victim and the offender in a multiple regression analysis, Bowers found that the regional variable still had a sig-

135. Gregg v. Georgia, 428 U.S. 153, 205 (1976) (quoting Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975)).

136. Bowers & Pierce, *supra* note 69, at 604.

137. Gross & Mauro made a similar finding, reporting that homicides committed in rural areas of Georgia and Florida were almost twice as likely as those in urban areas to result in a death sentence. Gross & Mauro, *supra* note 13, at 65. They may have underestimated substantially the magnitude of geographic variation, however, by combining felony and nonfelony homicides, because variation by locale is more pronounced in felony murders. *See* Bowers & Pierce, *supra* note 69, at 604.

nificant effect on the prosecutor's decision to indict a defendant for first degree murder. For comparable offenses, defendants in the central region of Florida were significantly more likely to be indicted for first degree murder than defendants elsewhere in the state.[138] After controlling for race and ten aggravating and mitigating factors, Bowers also found that defendants in the central region of Florida were significantly more likely to be convicted of first degree murder.[139] Finally, region also affected the likelihood of a death sentence being imposed. In this case, however, defendants in the northern and central regions of Florida were more likely to be sentenced to death for comparable offenses than those in other regions of the state.[140]

In a study of regional variations in Georgia, Baldus reported findings contrary to the Bowers study. Classifying each Georgia county as urban or rural, Baldus suggested that death sentencing rates in the two areas were roughly comparable. When comparing homicides at similar levels of aggravation, Baldus reported that a death sentence was only slightly more likely to be imposed in urban areas than in rural areas within lower aggravation levels, and a death sentence was slightly less likely at higher levels.[141] In no case, however, was the difference substantial. The reason for the difference in findings between Bowers's data from Florida and Baldus's Georgia data is unclear. It may reflect differences in methodology or different regional processes within each state. In any event, the studies on geographical variation are inconclusive and warrant further empirical research.

In sum, this extensive literature review suggests several conclusions. Empirical studies of capital sentencing under pre-*Furman* statutes revealed evidence of capriciousness and disparity by race of offender and victim. Although most were methodologically crude, even those studies executed with greater rigor showed compelling evidence of racial disparity and arbitrary decision making at several stages of the capital sentencing process. Although substantial de jure procedural reforms were made in post-*Furman* capital statutes, empirical research since *Furman* suggests that the reforms have not had their intended effect.

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138. Bowers, *supra* note 84, at 1072-74.
139. *Id.* at 1079-80.
140. *Id.* at 1083-86.
141. Baldus, Woodworth & Pulaski, *supra* note 85, at 1405.

This research consistently shows substantial victim-based racial disparity in the processing of capital cases. Although less conclusively, previous research also suggests the existence of two kinds of arbitrariness—variations among comparable crimes and variations across different geographical units within one state. Much of this research, particularly the most methodologically sophisticated, was conducted in Georgia under its post-*Furman* statute. The South Carolina Supreme Court noted several times in the first death case it reviewed under South Carolina's new death penalty statute that the statute is "constitutionally indistinguishable" from the Georgia statute.[142] We would expect and could argue by analogy that a pattern of capital sentencing in South Carolina similar to that unveiled in Georgia by Baldus and by Gross and Mauro would prevail. A more direct approach, however, is to evaluate empirically the pattern of capital sentencing in South Carolina after the first few years of its implementation. That is the focus of the following section.

## III. CAPITAL SENTENCING IN SOUTH CAROLINA: METHODOLOGY

### *A. Universe of Cases*

The empirical portion of this paper is an analysis of capital sentencing patterns in South Carolina during the first few years after implementation of its current death penalty statute. As noted earlier, South Carolina enacted a guided discretion death penalty statute after the state supreme court declared its previous mandatory statute unconstitutional in *State v. Rumsey*.[143] The universe of cases for empirical analysis includes all homi-

142. State v. Shaw, 273 S.C. 194, 203, 255 S.E.2d 799, 802, *cert. denied*, 444 U.S. 957 (1979); *see, supra* note 4 and accompanying text.

143. 267 S.C. 236, 226 S.E.2d 894 (1976). For an excellent review of the South Carolina death penalty statute and evolving case law through 1982, see Hubbard, Burry & Widener, *A Meaningful Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina*, 34 S.C.L. REV. 391 (1982). Hubbard and his colleagues addressed the legal dimension of some of the empirical issues examined in this paper, such as discrimination and proportionality review, and conducted a preliminary data analysis of 97 homicide cases in which the death penalty was considered. *Id.* at 449-62. Their data base excludes some cases in which the death penalty was requested and all cases in which it was not. It did not (and the authors did not suggest that it did) offer a comprehensive empirical analysis of capital sentencing in South Carolina.

cides committed in the state from enactment of the new statute on June 8, 1977, until December 31, 1981. During this four and one-half year period, approximately 1,800 nonnegligent homicides were committed in South Carolina. The unit of analysis throughout this research is the homicide event rather than an individual victim or defendant.

A homicide event is defined as an act of homicide committed by a single offender against one or more victims. If, for example, two offenders murdered one victim during an armed robbery, two homicide events would result, each involving multiple offenders killing a single victim in an armed robbery. On the other hand, if one offender killed two victims during an armed robbery, then only one homicide event would result—one involving a single defendant killing multiple victims during an armed robbery. The homicide event was selected as the unit of analysis, since, in the first example above, the prosecutor could seek and the jury could impose two death sentences on two defendants who may differ in their personal characteristics, criminal history, and degree of culpability. In the second homicide described above, a single defendant committed a distinct act of homicide, even though he killed more than one victim.

Of the original pool of 1,805 nonnegligent homicide events committed in South Carolina between June 8, 1977, and December 31, 1981, 119 were eliminated from further consideration because the offender was unknown or unidentified. Not all of the remaining 1,686 homicide events warrant attention because some of the defendants were not statutorily "eligible" for the death penalty. The 1977 Act essentially created a new category of homicide—capital murder. A capital murder comprises the traditional elements of a common-law murder and at least one of the aggravating circumstances enumerated in the statute.[144] Of

144. During the period covered by the study, the aggravating circumstances were:

(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

the 1,686 homicide events in the data set, only 311 or 18% included a statutory aggravating circumstance. In 97% or 302 of the 311 capital murders the requisite aggravating circumstance was the commission of a contemporaneous felony. Since the felony murders make up a large share of the total number of capital offenses, and to avoid any confounding influence in our examination of capital sentencing patterns, the analysis to follow is based on this group of 302 felony homicides. This restriction of the universe of cases to felony homicides should not present problems of generalizability or comparability with other post-*Furman* research on capital sentencing, since most of the other studies restricted their universe to felony murders.[145]

### *B. Data Sources*

Data for this study came from several different sources, each complementing and supplementing the others, which enabled the final data set to be checked for validity and to be enhanced. The initial source of information on South Carolina homicides is a law enforcement document called the Supplemental Homicide Report (SHR). The SHR is an abbreviated homicide report completed in addition to the normal police incident report. The local law enforcement agency completes an SHR for each homicide committed in the state and forwards it to the State Law Enforcement Division (SLED).[146] SLED provided a

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(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

S.C. CODE ANN. § 16-3-20(C)(a) (Law. Co-op. Supp. 1982) (current version at S.C. CODE ANN. § 16-3-20(C)(a) (Law. Co-op. Supp. 1987)).

145. *See, e.g.*, Bowers & Pierce, *supra* note 69; Gross & Mauro, *supra* note 13. In Gross and Mauro's study, for example, over 80% of the death sentences in Georgia and Florida, and 75% in Illinois were imposed in felony homicides. Gross & Mauro, *supra* note 13, at 57. In the Bowers and Pierce study, over 80% of the death sentences in Florida, Georgia, and Texas were for felony murders. Bowers & Pierce, *supra* note 69, at 599.

146. The coverage of SHR reports is virtually complete during the study period. In

computer generated copy of SHR information on each homicide committed between 1977 and 1981. Since this data included the year, county, law enforcement agency, date of offense, and some offense and offender characteristics, it was possible to construct each homicide as a homicide event and to establish a preliminary data file. Unfortunately, the SHR contains only limited information about the victim and the offender and almost no details about the offense and the manner in which it was committed. The SHR does include the age, race, and sex of victim and offender (if known), the relationship between victim and offender, the type of weapon used, the number of victims and offenders, and a brief label noting the circumstances of the offense (if the homicide was committed during a felony, an argument or lover's triangle, or whether drugs or alcohol were involved).

To obtain enough detail about each homicide to allow an accurate reconstruction of the event, the SHR information was supplemented by a second data source. The original police incident and investigation report was obtained from each law enforcement agency in the state that reported a homicide between June 8, 1977, and December 31, 1981. These incident and investigation reports are critical to an investigation of capital sentencing patterns for two reasons. First, since they are written by the local law enforcement officers who were present at the crime scene, the reports contain first hand and relatively unfiltered information. As noted earlier, the content of some homicide cases becomes altered at later stages as prosecutors upgrade and downgrade offenses from the original police report.[147] These police reports, then, are more reliable than prosecutors' files or court records. Second, these data are critical because their detailed quality allows a very precise reconstruction of the homicide. These incident and investigation reports contain detailed descriptive information pertaining to the offender, the victim,

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1977, 95% of all South Carolina law enforcement agencies participated in SLED's crime reporting program, including the SHR program. This proportion increased to 96% in 1978, 97% in 1979 and 99% in 1980-81. In addition, those law enforcement agencies not participating in the SLED SHR program were, in every year from 1977-81, very small departments, covering a limited geographical area, where few, if any, homicides were committed. We are ensured, then, of virtually total coverage of homicides committed in South Carolina.

147. Radelet and Pierce, *supra* note 84.

the crime scene and the manner in which the crime was committed. These reports almost always describe the nature and extent of the victim's injury and tell whether the body had been tied up, moved, or hidden. The reports also include witnesses' accounts. Sometimes they include descriptive information on the offender, such as drug or alcohol use, and his or her mental state. These reports did not vary in length or amount of detail by year, police agency, or type of homicide. This information was used to supplement, verify, and correct[148] the original data file constructed with the SHR.

The SHR and police incident and investigation report were obtained for nearly all of the 1,805 nonnegligent homicide events in the original data pool and for all 302 felony murders. In addition, conviction data were collected on the 302 cases. A computer listing of indictment and conviction records was obtained from the State Office of the Attorney General for every homicide committed in South Carolina from 1977 through 1982, one year after the cut-off point for the collection of the homicide data. This computerized record listed the name, race, sex, and birthdate of the defendant, the dates of the arrest and trial, the county where the trial took place, the outcome of the trial, and the sentence imposed. The disposition of each of the 302 felony murder cases was then coded as death, life imprisonment, imprisonment for a number of years, or a combination of these.[149] This information was matched and merged with the defendant's information in the police incident and SHR data file, creating an expanded data base for the 302 felony murder events.

All defendants convicted of nonnegligent homicide received a death sentence, a specified sentence of imprisonment, or both and were, therefore, under the jurisdiction of the South Carolina Department of Corrections (DOC). With the permission of the

148. The law enforcement agency collects the SHR information at the time the offense is committed. It may not know then who or how many offenders committed the offense. Subsequent investigation of the crime by the police may uncover the identity of the offender or reveal, contrary to the SHR, that more than one offender committed the offense. In these cases, after verifying the police report through a booking report or court transcript, the SHR data were corrected.

149. A felony murder defendant who kidnaps, rapes and murders the victim might receive a death sentence plus twenty years imprisonment for the kidnapping, and fifteen years imprisonment for the rape. The disposition code in the data set would be "death received plus years."

Department, criminal history information was obtained from each defendant's DOC files, part of which includes arrest, booking, and conviction data, and a detailed chronology of their criminal history in their FBI "rap sheet." This information was also matched and merged with the master data file.

Finally, information was obtained on whether the prosecutor sought a death sentence at any time in each of the 302 cases. The 1977 Act requires the prosecution to notify defense counsel of its intention to seek the death penalty at least 30 days before the trial.[150] In addition, a mandatory administrative procedure requires a prosecutor seeking the death penalty to file a form stating such intent with the South Carolina Court's Administrator, who then forwards a copy to the state supreme court. A copy of each of these notices from 1977 to 1981 was obtained. In addition, staff at local public defenders' offices and the State Office of Appellate Defense (who defend and sometimes monitor most capital cases) were asked when death sentences were sought during this period. It was then possible to record for each case whether the prosecutor charged a homicide as a capital or noncapital homicide.[151]

### *C. Decision Points to be Analyzed*

This study examines the extent and magnitude of racial disparity and arbitrariness in capital sentencing under South Carolina's post-*Furman* statute. The introduction to this Article suggested that the procedural reforms undertaken in the South Carolina legislature were similar in purpose to those undertaken in Georgia and approved by the Court in *Gregg*—to produce greater evenhandedness in both its forms (nondiscriminatory and noncapricious justice). More specifically, the study addresses the following issues. First, it addresses the extent to which the race of the victim and offender affected two critical decision points in the capital sentencing system: (a) the prosecutor's decision to seek the death penalty, and (b) the jury's decision to impose one. Evenhanded justice under this analysis requires that prosecutorial and sentencer behavior not be

150. S.C. CODE ANN. § 16-3-26(A) (Law. Co-op. Supp. 1987).

151. Since the revisions of the state's death penalty statute in effect created a new crime of capital murder, filing an intent to seek the death penalty is a charging decision.

influenced by either race of the victim or offender after taking into account legally relevant characteristics of the offense and offender. Second, this Article addresses arbitrary capital setencing by conducting an empirical proportionality review. Cases resulting in a death sentence will be juxtaposed with comparable cases resulting in other types of punishment to determine if the death penalty is administered in a consistent, rational manner. We will attempt to discover the theory of law the South Carolina Supreme Court uses in conducting its own, statutorily mandated, proportionality review.[152]

## IV. CAPITAL SENTENCING AND RACIAL DISCRIMINATION IN SOUTH CAROLINA: EMPIRICAL FINDINGS

### *A. Prosecutor Behavior*

*1. Preliminary Findings.* The decision of the prosecutor to seek a death sentence is the first, and one of the most critical, decision points in the process of capital punishment. Sentencers cannot impose a death sentence, no matter how heinous the offense, if the prosecutor does not file an intent to seek death. In making the decision to seek a capital sentence, South Carolina's prosecutors are provided with virtually unlimited and unmonitored discretion. Neither the South Carolina statute nor established case law[153] attempts to restrict or channel the prosecutor's discretion in making this decision. Although Justice White's opinion in *Gregg* suggested that prosecutorial behavior will be guided by the same statutory criteria that structure the decision of capital sentencers, the Court has not attempted (and appears disinclined to attempt) a procedural reform of this stage of capital sentencing.[154] In addition, discriminatory decision making at the prosecutorial stage may be partially concealed or appear in altered forms at later stages because the prosecutor's decision to seek a death sentence is highly discretionary, providing the opportunity for the exercise of extra-legal factors, and

152. S.C. CODE ANN. § 16-3-25(C) (Law. Co-op. 1987).

153. Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, *cert. denied*, 444 U.S. 957 (1979).

154. *See supra* note 18 and accompanying text.

occurs very early in the process.[155]

The data indicate that prosecutors in South Carolina regularly exercised the discretion provided them by statute and case law. Of the 302 felony homicide events occurring during the period examined here, prosecutors sought a sentence of death in only 114 (38%). Table 1 examines the distribution of death requests according to the race of the victim and offender. The prosecutors' decisions to seek a death sentence was independent of the race of the offender. They sought death in 41% of felony murders with white defendants and 36% with black defendants. The decisions to seek death, however, were influenced by who was killed. Prosecutors were almost two and one-half times more likely to seek a death sentence if a white, rather than a black, was slain. These data reveal a familiar pattern of victim-based racial disparity under post-*Furman* capital punishment statutes and are similar to Baldus's finding under the "constitutionally indistinguishable" Georgia statute that prosecutors were almost three times more likely to request a death sentence in white- than in black-victim cases.[156]

Table 1 also reports the likelihood of a prosecutorial death sentence request according to racial combinations of the offender and victim, and the data show considerable racial disparity. A black offender who killed a white was almost four times more likely to face a death sentence than was a black who killed another black. Homicides in which a black killed another black were only one-third as likely to result in a death penalty request compared with all other homicides. Of all racial combinations, prosecutors were particularly likely to seek the death penalty when a black killed a white and particularly unlikely to do so in intra-race black homicides.

155. *See supra* note 51 and accompanying text.
156. Baldus, Woodworth & Pulaski, *supra* note 85, at 1403.

Table 1: Probability of Prosecutor Seeking the Death Penalty for Felony Homicides in South Carolina by Race of Offender and Victim

| | | (Cases) | Probability | Ratio |
|---|---|---|---|---|
| Death Sought | White Offender | (49/119) | .412 | 1.16 |
| | Black Offender | (65/183) | .355 | |
| | White Victim | (97/215) | .451 | 2.31 |
| | Black Victim | (17/87) | .195 | |
| | Black Kills Black | (10/72) | .139 | |
| | Black Kills White | (55/111) | .495 | |
| | White Kills Black | ( 7/15) | .467 | |
| | White Kills White | (42/104) | .404 | |
| | Black Kills Black | (10/72 ) | .139 | 3.25 |
| | All Others | (104/230) | .452 | |
| | Black Kills White | (55/111) | .495 | 1.60 |
| | All Others | (59/191) | .309 | |
| | Black Kills Black | (10/72) | .139 | 3.56 |
| | Black Kills White | (55/111) | .495 | |

The data in Table 1, then, reveal a simple feature of prosecutorial behavior under South Carolina's post-*Furman* capital punishment statute: prosecutors were more likely to seek a death sentence in a homicide in which a white was killed, particularly if the defendant was black. This does not mean, however, that the prosecutors' intentions to seek death were racially motivated—that they sought a death sentence *because of* race. The racial differences reported in Table 1 may be the unintended product of a completely evenhanded process. Death sentences may have been sought more often in white-victim cases because they were more aggravated than black-victim cases. Yet, since all of the offenses reported in Table 1 were felony homicides, one important factor in the prosecutors' decisions—the felony circumstance of the offense—was controlled. These felony homicides, however, are not entirely comparable: some may have been brutal slayings, or murders of multiple victims, or some may have been committed by particularly culpable offenders with extensive criminal histories. Observed racial disparities, therefore, may have been due to the operation of other legally

relevant factors which affected prosecutorial decision making.

The literature on capital sentencing and prosecutorial behavior in general suggests several such factors,[157] including the age and sex of the victim, the number of victims and offenders, the relationship between the victim and offender, the offender's prior record, the brutality of the offense, or the existence of general mitigating circumstances such as the offender's use of alcohol or drugs, or willingness to assist law enforcement officials. Table 2 reports the relationship between several of these factors and the decisions of South Carolina prosecutors to seek a death sentence in the 302 felony homicides. The first column of Table 2 reports the percentage of death cases found under each level of the offender or offense characteristic; the data show that several of these factors were important determinants of the prosecutors' decisions to seek a death sentence. For example, in a felony homicide, a request for the death penalty was more likely to be made if there were multiple (55.3%), rather than single (34.5%), victims.[158]

157. For studies of prosecutorial decision making, see F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); Applegate, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 TEMP. L.Q. 35 (1982); Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980); Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659 (1981); Myers & Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439 (1979).

158. The associated percentage of each type of case not resulting in a death request is not reported in the table, but is implicit. For example, Table 5 reports that approximately 55% of the 47 multiple-victim cases resulted in a death penalty request; implicitly, 45% did not result in a request. Similarly, 34.5% of all single-victim homicides resulted in a death request according to the table, and 65.5% implicitly did not. Since the percentage of cases of each characteristic that resulted in a death request is of primary interest, only that comparison is reported.

Table 2: Relationship Between Legally Relevant Offender/Offense Characteristics and Prosecutor's Decision to Seek a Death Sentence by Race of Victim

| Characteristic | | (N) | Percentage of Death Requests | (Gamma) | (N) | Percentage in White Victim Cases | (N) | Percentage in Black Victim Cases | (Gamma) |
|---|---|---|---|---|---|---|---|---|---|
| Age of Victim | Under 20 or Over 55 | (161) | 37.3 | −.02 | (215) | 40.9 | (87) | 60.9 | .38[a] |
| | 20-54 | (141) | 38.3 | | | 59.1 | | 39.1 | |
| Number of Victims | Single | (255) | 34.5 | .40[a] | (215) | 81.9 | (87) | 90.8 | .37[a] |
| | Multiple | (47) | 55.3 | | | 18.1 | | 9.2 | |
| Number of Offenders | Single | (134) | 29.1 | .32[a] | (215) | 38.1 | (87) | 59.8 | .41[a] |
| | Multiple | (168) | 44.6 | | | 61.9 | | 40.2 | |
| Victim/ Offender Relationship | Acquaintance | (114) | 23.7 | .47[a] | (215) | 30.2 | (87) | 56.3 | .50[a] |
| | Stranger | (188) | 46.3 | | | 69.8 | | 43.7 | |
| Offender's Criminal History | No Priors | (209) | 20.1 | .86[a] | (215) | 61.9 | (87) | 87.4 | .62[a] |
| | One or More Priors | (93) | 77.4 | | | 38.1 | | 12.6 | |
| Type of Weapon | Gun | (208) | 41.8 | .28[a] | (215) | 28.4 | (87) | 62.1 | .21 |
| | Other | (94) | 28.7 | | | 71.6 | | 37.9 | |
| Number of Statutory Aggravating Factors[b] | One | (197) | 17.8 | .87[c] | (215) | 60.5 | (87) | 77.0 | .37[a] |
| | Two or More | (105) | 75.2 | | | 39.5 | | 23.0 | |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Number of Non-Statutory Aggravating Factors[c] | None | (240) | 26.7 | .84[a] | (215) | 76.7 | (87) | 86.2 | .31 |
| | One or More | (62) | 80.6 | | | 23.3 | | 13.8 | |
| Number of Non-Statutory Felonies[d] | None | (248) | 33.5 | .46[a] | (215) | 80.5 | (87) | 86.2 | .21 |
| | One or More | (54) | 57.4 | | | 19.5 | | 13.8 | |
| Number of Mitigating Factors[e] | None | (148) | 28.4 | .38[a] | (215) | 44.2 | (87) | 60.9 | .33[a] |
| | One or More | (154) | 46.8 | | | 55.8 | | 39.1 | |

[a] Significant relationship as measured by a standard chi-square test of statistical significance, gamma measures the strength of the relationship with a maximum value of 1.0.

[b] Since the analysis in this Article is restricted to felony murders, all of the homicides involve at least one statutory aggravating circumstance.

[c] These factors include multiple efforts to kill victim (*i.e.*, stabbing and shooting); attempts to hide the body; post-mortem abuse; victim pleading for life.

[d] Includes felony offenses except those included as statutory aggravating felonies.

[e] These factors include statutory (S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1987)) and non-statutory factors in mitigation found in the police homicide report and SHR.

A comparison of the percentage of death requests found under each condition shows that the prosecutors' decisions to seek a death sentence were made on the basis of rational, meaningful criteria. A prosecutor was substantially more likely to seek the death penalty if the offense involved multiple rather than single victims or offenders; if the victim was a stranger; if the offender had a history of prior arrests for a violent crime; if the murder was committed with a gun rather than another type of weapon; and if the homicide included more than one statutory aggravating circumstance, one or more non-statutory aggravating circumstances, another non-statutory felony, or no mitigating circumstances. Each of these legally relevant factors appears to have been significantly related to the prosecutors' decisions to seek a death sentence. Not only were prosecutors more likely to seek a death sentence when an aggravating factor was present, but also these aggravating elements were more likely to exist in white-victim homicides than in black-victim homicides. Table 2 also compares the prevalence of these factors in white- and black-victim homicides. For example, one of the most important factors in prosecutors' decisions to seek a death sentence was the offender's criminal history. Table 2 shows that 38% of all white-victim homicides were committed by offenders with one or more prior arrests for a violent criminal offense, while only 13% of all killers of blacks had a violent criminal past. The same pattern prevails for other offender or offense characteristics in Table 2: a greater percentage of white-victim homicides compared with black-victim homicides included an aggravating characteristic.

The data hint, then, that killings of white victims were qualitatively different from killings of blacks, and the killings differed in a way that may explain, without reference to racial discrimination, why prosecutors were more likely to seek a death sentence in homicides of white victims. The approach taken thus far in comparing the kinds of homicides committed against black and white victims is not particularly informative, however, since it only compares the relative incidence of particular homicide characteristics (for example, multiple versus single victims). Another, perhaps more refined, way to look at the differences in homicides committed against white and black victims is to compare their *overall* degree of aggravation. This approach combines several of the aggravating and mitigating factors in Table 2 into a single measure reflecting each homicide's overall degree

of seriousness or egregiousness. An estimated composite aggravation score more accurately portrays the comparison between relative egregiousness of the homicides committed against white and black victims.

Such a procedure is employed here. The overall degree of aggravation for each homicide is calculated by estimating a multiple regression logit equation.[159] A logit equation is similar to regular multiple regression[160] because it estimates the independent effect of several explanatory variables on an outcome variable. Logistic regression analysis is statistically appropriate when the outcome variable is a dichotomy (0,1; life sentence, death sentence).[161] In this analysis, aside from several explanatory variables, the dichotomous outcome variable is whether prosecutors sought the death penalty. The explanatory variables are the nine factors identified in Table 2 that were significantly related to the decision to seek a death sentence. The logistic regression analysis fits a mathematical model to the outcome variable and the effect of each explanatory variable on this outcome decision is expressed as a weighted coefficient. At this point the individual logistic coefficients are of no concern. Since they do, however, estimate the direction and size of the effect of each explanatory variable on the outcome variable, these effects have been summed to provide a total aggravation score for each homicide.[162]

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159. A more detailed and technical discussion of logit regression can be found in S. ALDRICH & F. NELSON, LINEAR PROBABILITY, LOGIT AND PROBIT MODELS (1984); S. FEINBERG, THE ANALYSIS OF CROSS-CLASSIFIED CATEGORICAL DATA (1977); J. FOX, LINEAR STATISTICAL MODELS AND RELATED METHODS (1984).

160. Aldrich & Nelson, *supra* note 159.

161. For a more technical discussion of the logit procedure, see Technical Appendix, *infra* p. 412.

162. Three features about this aggravation score should be noted. First, the weights (coefficients associated with each explanatory factor) used in calculating the score are based on a logistic regression analysis; thus, the total aggravation score is equal to the log of the odds of the prosecutor seeking a death sentence. Second, the total score reflects the *overall* degree of aggravation presented by each homicide, based on summated weights. Two homicides may receive equivalent overall scores, but may have vastly different fact patterns. One homicide may have only a few particularly aggravating factors present (perhaps offset by a mitigating factor), while another may have a similar score because of several minor aggravating factors. Although the specific features of the cases may differ, they still are roughly comparable in the eyes of prosecutors deciding in which cases to seek a death sentence. Third, the logistic regression equation used to estimate the total aggravation score includes all nine legally relevant variables (explanatory factors found to be significant in Table 2), as well as the race of the victim and offender.

An aggravation score for each of the 302 homicides was rank ordered, and classified into five groups of roughly equal score intervals. Table 3 reports the number of felony murders falling into each aggravation level and the number of death penalty requests. The data in Table 3 clearly show both the overall rational manner in which South Carolina prosecutors decided to seek death sentences and the predictive power of the aggravation scale. One hundred and forty, or 46%, of the felony murders were at the lowest level of aggravation. These homicides were the least heinous in the pool of cases, and the probability that the prosecutor would seek a death sentence was correspondingly low, only 6 in 100. As the aggravation level of the homicide increased, however, the likelihood of a death sentence request also increased. The aggravation scale identifies 57 homicides as high aggravation cases (levels 4 and 5), and prosecutors sought death sentences in 91% of these cases. Based upon individual aggravating and mitigating factors of an offense, the logistic regression-based aggravation scale estimated here is very successful in classifying the most heinous homicides.

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This procedure follows a recommendation by a sentencing research panel of the National Research Counsel. According to the panel's report, the effect of variables such as the race of the victim and of the offender should be included explicitly in the model before calculating the weights for the legally relevant factors to ensure that the weights do not include any of the effects of race. *See* RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983). The final score was calculated by summing the estimated coefficients for the explanatory variables significantly related ($p.<.10$) to the decision to seek a death sentence. The results of the logistic regression are as follows:

| Explanatory Factor | Logistic Weight |
|---|---|
| Prior Violent Record | 2.4589* |
| Number of Victims | − .2487 |
| Number of Offenders | .0347 |
| Victim/Offender Relationship | .3117 |
| Mitigating Circumstance | − .2432 |
| Race of Offender | − .1205 |
| Race of Victim | .4856 |
| Type of Weapon | .6767* |
| Statutory Aggravating Circumstance | 1.7060* |
| Non-Statutory Felony | .9846* |
| Non-Statutory Aggravating Factor | 1.9945* |

The factors with an asterisk are those included in the calculation of the total aggravation score. A second scale which included weights for all nine legal factors (race variables excluded) was calculated, but the results did not differ from those reported.

Table 3: Probability of the Prosecutor Seeking a Death Sentence in Felony Homicides Controlling for the Aggravation Level of the Homicide

| Aggravation Level | Probability of Death Sentence Being Sought |
|---|---|
| 1 (Lowest) | .057 (8/140) |
| 2 | .333 (18/54) |
| 3 | .706 (36/51) |
| 4 | .919 (34/39) |
| 5 (Highest) | .900 (18/20) |
| All Cases | .377 (114/302) |

Of most concern is the extent to which white- and black-victim homicides have different magnitudes of aggravation. This question was initially answered in Table 2 and is addressed in greater detail in Table 4, which reports the percentage of cases falling into each of the five aggravation levels for different racial characteristics. These data confirm the suggestion in Table 2 that white-victim homicides were significantly more aggravated than those of black victims. The first panel of Table 4 shows that, while 25% of all white-victim cases were at the two highest levels of aggravation, only 7% of black-victim homicides were comparably aggravated. Large differences in the overall level of aggravation appear when victim and offender racial combinations are compared. For example, a comparison of black-on-black killings with all other homicides shows that less than 5% of black-on-black murders were at the highest two levels of aggravation, while about one in four homicides of other racial combinations were in the two highest levels. Homicides in which a black killed a white were also more likely to be especially aggravated. Almost 30% of all black-on-white killings were at the highest levels of aggravation, while only 15% of all other killings, and less than 5% of the subgroup of black-on-black killings, were as aggravated.

Table 4: Relationship Between the Level of Aggravation of a Homicide and Racial Characteristics of the Victim and Offender

| Aggravation Level | White Victim (n) | Black Victim (n) |
|---|---|---|
| 1 (low) | 39.5 (85/215) | 63.2 (55/87) |
| 2 | 19.5 (42/215) | 23.0 (20/87) |
| 3 | 15.3 (33/215) | 6.9 ( 6/87) |
| 4 | 17.7 (38/215) | 4.6 ( 4/87) |
| 5 (high) | 7.9 (17/215) | 2.3 ( 2/87) |
| | $x^2 = 21.99^a$ | gamma = .45 |
| Aggravation Level | Black Kills Black (n) | All Others (n) |
| 1 (low) | 69.4 (50/72) | 44.3 (102/230) |
| 2 | 22.2 (16/72) | 14.8 ( 34/230) |
| 3 | 4.2 ( 3/72) | 15.7 ( 36/230) |
| 4 | 2.8 ( 2/72) | 14.3 ( 33/230) |
| 5 (high) | 1.4 ( 1/72) | 10.9 ( 25/230) |
| | $x^2 = 26.35^a$ | gamma = .52 |
| Aggravation Level | Black Kills White (n) | All Others (n) |
| 1 (low) | 36.9 (44/111) | 51.8 ( 99/191) |
| 2 | 20.7 (23/111) | 20.4 ( 39/191) |
| 3 | 13.5 (15/111) | 12.6 ( 24/191) |
| 4 | 18.9 (21/111) | 11.0 ( 21/191) |
| 5 (high) | 9.9 (11/111) | 4.2 ( 8/191) |
| | $x^2 = 10.23^a$ | gamma = .27 |
| Aggravation Level | Black Kills White (n) | Black Kills Black (n) |
| 1 (low) | 36.9 (44/111) | 69.4 ( 50/72) |
| 2 | 20.7 (23/111) | 22.2 ( 16/72) |
| 3 | 13.5 (15/111) | 4.2 ( 3/72) |
| 4 | 18.9 (21/111) | 2.8 ( 2/72) |
| 5 (high) | 9.9 (11/111) | 1.4 ( 1/72) |
| | $x^2 = 26.06^a$ | gamma = .57 |

Thus far, the data reported in Tables 1 through 4 suggest the following: (1) South Carolina prosecutors were more likely to seek a death sentence in felony homicides of a white than of a black, particularly if the offender was black (Table 1); (2) the

prosecutors' decisions to seek death were motivated by the aggravation of the homicide as reflected both in particular features (Table 2) and in an overall assessment of the case (Table 3); and (3) white-victim homicides were more aggravated than black-victim homicides, particularly if the offender was black (Table 4). The data clearly suggest that one reason prosecutors were more likely to seek a death sentence in a white-victim homicide than in a black-victim homicide is that the former were more aggravated than the latter. This does not mean, however, that differences in the kinds of homicides explain all of the racial disparity initially observed in Table 1. To rule out definitively and unequivocally the possibility that race affected prosecutors' decisions to seek the death penalty, the effect of race must be examined after first controlling for the legally relevant factors that make one offense more or less egregious than others. The critical review of previous literature suggests that the methodologically preferred approach is to control simultaneously for several of these factors before examining the effect of race.

To implement this approach, two methods were used. First, a multiple regression analysis was estimated; it included all nine legally relevant factors found in Table 2 to be related to prosecutors' intentions to seek a death sentence, and it included the race of the victim and offender. Thus, we first controlled for a large number of factors important to prosecutors' decisions, and then we estimated the independent contribution of race. Second, we examined the probability that a prosecutor would seek a death sentence according to various racial characteristics of the offender and victim within a group of comparably aggravated cases. For this we used the aggravation scale employed earlier to assess the aggravation level of each homicide, we grouped these into categories of comparable aggravation, and we estimated rates of death sentence requests for different racial groups. We thus can compare the likelihood of death being requested for different racial groups for homicides that were similar in their overall level of aggravation.

*2. Regression Analysis of Racial Discrimination and the Charging Decision.* Table 5 reports the first multiple regression analysis. Since the outcome variable is a dichotomy (death sought, death not sought) ordinary least squares estimation is not appropriate, and, therefore, we estimated a logistic regression equation. One result of logistic regression is a maximum

likelihood coefficient for each explanatory variable. The coefficient indicates the change in the log of the odds that a death sentence request was based on offender or offense characteristics, while controlling for all other variables in the model.[163] The maximum likelihood coefficient is not, in itself, particularly informative, but it can be converted into a valuable and easily understood indicator of the variable's importance. Taking the antilog of the logistic coefficient produces the "odds multiplier," which reflects the increase in the odds of the outcome variable occurring in the presence of that factor. For example, the odds of the prosecutor seeking a death sentence was increased almost twelve times ($e^{-2.4589}=11.69$) when the defendant had a prior violent record. Table 5 also includes a classification table that assesses the overall predictive accuracy of the model, which reflects how well it predicts when the prosecutor would seek a death sentence.[164] In each analysis two equations are estimated. The first equation includes all nine legally relevant factors plus the racial variables. Based upon these results, a second, more parsimonious equation is estimated which includes only the statistically significant full model variables ($p<.10$) and the race variables.

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163. More generally, each coefficient is the linear change in the natural log of the odds ratio of the outcome variable produced by a change in the independent variable.

164. In ordinary least squares multiple regression analysis the overall fit of the model is usually determined in part by the amount of variance ($R^2$) explained by the set of explanatory variables included in the equation. Although there is an ($R^2$) analog for logit and probit models, its sampling distribution is unknown, and the calculated value may underestimate substantially the model's true fit. *See* McKelvey & Zavoina, *A Statistical Model for the Analysis of Ordinal Level Dependent Variables*, 4 J. MATH. SOC. 103 (1975). In its place the Model Classification Table reported at the bottom of each logistic regression table is employed. This table allows an estimation of the overall goodness of fit of the model in terms of its ability to predict the outcome on the dependent variable. In the classification table, the term "percent correctly classified by the model" estimates the accuracy of the prediction based upon the marginals predicted by the model. It is the sum of the diagonal cells in which the predicted outcome is correct according to the actual outcome divided by the total number of cases. For an example of the calculation of the model classification table, see notes 170 and 172 *infra* and accompanying text. The "percent correctly classified by chance" is based upon marginal distributions assuming the actual outcome and predicted outcome are independent. This procedure is similar to that done for expected cell frequencies used in standard chi-square tables. The "proportion reduction in error relative to chance" measures the percent of classification error by chance that is reduced by employing the model for predicting the outcome relative to chance prediction. It reflects, then, the percentage of errors one would have made, but no longer makes, based upon predictions from the model.

Table 5A: Maximum Likelihood Logit Estimates for Prosecutor's Decision to Seek a Death Sentence in South Carolina - Full Model

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | 2.4589[a] | 11.69 |
| Number of Victims | −.2487 | .78 |
| Number of Offenders | .0347 | 1.04 |
| Victim - Offender Relationship | .3117 | 1.37 |
| Number of Mitigating Circumstances | −.2432 | .78 |
| Race of Offender | −.1205 | .89 |
| Race of Victim | .4856 | 1.62 |
| Type of Weapon | .6767[a] | 1.97 |
| Total Number of Statutory Aggravating Circumstances | 1.7060[a] | 5.82 |
| Number of Felony Offenses in Addition to Murder | .9846[a] | 2.68 |
| Number of Non-statutory Aggravating Factors | 1.9945[a] | 7.35 |
| Constant | −3.4840 | |
| Model Classification: Percent correctly classified by the model: | | 85.10% |
| Percent correctly classified by chance: | | 53.31% |
| Proportion reduction in error relative to chance: | | 69.58% |

Table 5B: Maximum Likelihood Logit Estimates for Prosecutor's Decision to Seek a Death Sentence in South Carolina - Reduced Model

| | ML Estimate | Odds Multiplier |
|---|---|---|
| Prior Violent Record | 2.3382[a] | 10.36 |
| Type of Weapon | .6186[a] | 1.86 |
| Race of Victim | .5233[a] | 1.69 |
| Total Number of Statutory Aggravating Circumstances | 1.7673[a] | 5.86 |
| Number of Felony Offenses In Addition to Murder | .9429[a] | 2.57 |
| Number of Non-Statutory Aggravating Factors | 1.9623[a] | 7.12 |
| Constant | −3.4230 | |
| Model Classification: Percent correctly classified by the model: | | 85.10% |
| Percent correctly classified by chance: | | 52.65% |
| Proportion reduction in error relative to chance: | | 69.03% |

[a] $p<.10$.

[b] The odds multiplier indicates how many times an offender's odds of receiving a particular outcome are increased (a multiplier greater than 1.00) or decreased (a multiplier less than 1.00) by the presence of a particular offender or offense characteristic. For example, an offender with a prior violent record has almost a twelve times greater likelihood of having the death penalty sought than one without a violent criminal history.

Table 5 reports the results of the logistic regression analysis when victim and offender race are included as independent effects. As before, the data show that, when deciding when to seek a death sentence, prosecutors were influenced by the case characteristics of a homicide and were responsive to its degree of aggravation. A prosecutor was more likely to seek a death sentence if the defendant had a prior violent record (twelve times as likely), if the murder was conducted with a gun (twice as likely), if the offense involved more than one statutory aggravating circumstance (almost six times as likely), or if it involved a non-statutory aggravating factor (over seven times as likely). The decision to seek a death sentence apparently was not influenced by the number of victims or offenders, the relationship between the victim and offender, or by the presence of mitigating factors.

The utility of the logistic regression analysis in modeling the prosecutor's intention to seek a death sentence is shown by using the logistic density function to estimate this probability in a particular case. A fairly typical example is a felony murder in which one offender killed one victim during an armed robbery, after which the victim pleaded for his life but was bound and shot. The logistic regression equation in this case would have the following form: a defendant with no prior violent record ($x_1=0$), a homicide of one victim ($x_2=0$), by one offender ($x_3=0$), who is a stranger ($x_4=1$), with no mitigating circumstances ($x_5=0$), with the use of a gun ($x_6=1$), with one statutory aggravating circumstance ($x_7=0$), with no non-statutory felonies ($x_8=0$), and with one non-statutory aggravating circumstance ($x_9=1$). Taking the estimated values in Table 5 the equation modeling a death request (DR) would be:

$$DR = -3.4840 + 2.4589(0) + (-.2487)(0) + .0347(0) + .3117(1) + (-.2432)(0) + .6767(1) + 1.7060(0) + .9846(0) + 1.9945(1)$$

$$DR = -3.4840 + .3117 + .6767 + 1.9945$$

$$DR = -.5011$$

The logit prediction is -.5011, which is the predicted log of the odds of the death penalty being requested. It corresponds to a predicted probability of .377 that the prosecutor would seek the death penalty in the case discussed above.[165]

165. The logistic function is $P=1/(1+e^{-XB})$. *See supra* note 161. Re-expressing this

The regression results in Table 5 permit an examination of the role of racial variables in this decision making process. As in Table 1, these data show quite clearly that prosecutors' decisions to seek a death sentence were independent of the offender's race when considered apart from the victim's race. The logit coefficient was not significantly different from zero and the odds multiplier was not substantially different from 1.00. This analysis, however, also shows that the victim's race was fairly strongly related to prosecutors' decisions to seek the death penalty. Although the victim's race was not the most important determinant of the decisions, it was influential in determining when the death penalty was sought. Prosecutors were almost twice (1.62) as likely to seek a death sentence if a white was killed than if the victim was black. In Table 1, where no statistical controls for legally relevant factors were made, a death request was almost two and one-half times (2.31) more likely in white-victim than in black-victim cases. Because the disparity was reduced from a ratio of 2.31 to 1.62, Table 5 indicates that part of this racial difference was due to differences in the characteristics of white-victim and black-victim homicides. Although the effect of victim's race diminishes in Table 5 it does not disappear. In Table 5A, even with nine legally relevant offender and offense characteristics controlled, the race of the victim was influential in determining when prosecutors would seek a death sentence and was more influential than four of the nine legally permissible factors.

Another way to see the effect of victim's race is to use the logistic regression equation to calculate the probability of a death sentence request in a white-victim homicide and a comparable black-victim homicide. In the typical felony murder of a black victim presented earlier, the predicted probability was .377.[166] Keeping every feature of this hypothetical homicide the same, but now assuming it was committed against a white rather than a black victim, the probability that the prosecutor would seek a death sentence becomes:

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as $1\text{-}P=1/(1+e^{XB})$ the example is $1\text{-}P=1/(1+e^{-.5011})$ which is $1\text{-}P=1/(1+.606)$ or $1\text{-}P=.623$, so $P=.377$, the predicted probability of the death penalty being requested. In this example the race of the victim and offender were excluded since this implies a value of zero, both the offender and victim were black.

166. *See supra* note 165 and accompanying text.

$$DR = -3.4840 + 2.4589(0) + (-.2487)(0) + .0347(0) + .3117(1) + (-.2432)(0) + .6767(1) + 1.7060(0) + .9846(0) + 1.9945(1) + .4856(1)$$

$$DR = -3.4840 + .3117 + .6767 + 1.9945 + .4856$$

$$DR = -.0155$$

Again, this figure is the predicted log of the odds that a prosecutor would seek the death penalty, and it corresponds to a predicted probability of .496. For identical homicides, then, the odds of the prosecutor seeking a death sentence increased from .377 if committed against a black to .496 if committed against a white.

Before proceeding with this analysis, it is necessary to comment briefly on the adequacy of the model producing so many important, substantive conclusions. From the results of the logit regression, a prediction table can be calculated to allow an assessment of how well this analysis models the prosecutors' decisions.[167] Based upon the predicted probabilities estimated from the logistic regression equation, we predictively classified the pool of 302 cases as either: (1) death would be requested or (2) death would not be requested.[168] We then cross-classified the predicted outcomes with the actual outcomes. For the predicted model reported in Table 5, this classification table is as follows:

Death Penalty Requested

| | | Predicted No | Outcome Yes | |
|---|---|---|---|---|
| Actual Outcome | No | 167 | 21 | 188 |
| | Yes | 24 | 90 | 114 |
| | | 191 | 111 | 302 |

Our logistic regression model predicted that the prosecutor would seek a death sentence in 111 of the 302 felony homicide cases. Of these 111 cases, the prosecutor actually filed an intention to seek death in 90; of the 191 cases for which the model

167. The logistic regressions and the model classification tables based upon them were estimated using the statistical software package called CRAWTRAN developed by Robert Avery of Carnegie-Mellon University. *See* Avery, QUALITATIVE DEPENDENT VARIABLE PROGRAM CRAWTRAN (1980).

168. The specific procedures used in calculating the model classification table and the results can be obtained from the authors upon request.

predicted no death request, no request was sought in 167 cases. The model, then, accurately predicted 257 (90+167) of 302 cases, for a correct prediction rate of 85.10% (Table 5). More importantly, however, is *how* the model accurately can classify 85% of these cases. Predictive accuracy can be achieved by correctly predicting those cases in which a death sentence was not sought (predicting true negatives) and those in which one was requested (predicting true positives). Most empirical studies in social science, and especially those based on legal research, have substantially lower than the 85% predictive accuracy achieved here. In addition, most of the reported predictive accuracy is obtained by accurately predicting true negatives, by predicting not the occurrence of the outcome but its nonoccurrence.[169] The classification table above, however, indicates that the overall level of predictive accuracy includes accurate prediction of both true negatives (167/188=89%) and true positives (90/114=80%). This model of the prosecutor's charging decision allows one to predict with equivalent precision when the prosecutor will not and, more importantly, when she will seek a sentence of death. This model also can reduce prediction errors by 69.58% over chance.[170]

Tables 6 and 7 refine this analysis of the effect of race on the decision to seek a death sentence. Both tables report the results of a logistic regression analysis similar to that reported in Table 5, but with different race variables. In Table 6 the inde-

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169. For reviews of the prediction literature in law and social science, see MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981); M. MOORE, S. ESTRICH, D. MCGILLIS & W. SPELLMAN, DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE (1984); AMERICAN PSYCHIATRIC ASSOCIATION, TASK FORCE REPORT: CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL (1974); Steadman & Morrissey, *The Statistical Prediction of Violent Behavior*, 5 LAW & HUM. BEHAV. 263 (1981). Most of this literature deals with the prediction of violence or future criminality; very little research on the prediction of judicial decision making has been published.

170. We can estimate the percentage of cases we would classify correctly by chance by assuming the predicted and actual outcomes are independent of one another. In predicting by marginal distributions, the predicted frequencies in the diagonals would be:

$$\frac{188(191)}{302} = 119 \quad \text{and} \quad \frac{114(111)}{302} = 42$$

We would then have predicted 161(119+42) of 302 cases for a prediction rate by chance of 53.31% (see Table 5). Based upon our model, approximately 15% of our predictions are wrong; based upon chance, approximately 47% of our predictions would be wrong. The percentage of errors that we would have made by chance, but no longer make because we employ the model, is calculated roughly as:

pendent effect for the offender's and victim's race is replaced with a racial combination dummy variable which compares black-on-black homicides with all others. Table 7 includes a dummy race variable that compares black-on-white homicides with all others.

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$$1 - \left( \frac{\text{possible error by model}}{\text{possible error by chance}} \times 100 \right)$$

or

$$\frac{\text{percent correct by model - percent correct by chance}}{\text{100 - percent correct by chance}}$$

This formula only applies when the row and column marginals are the same.

Table 6A: Maximum Likelihood Logit Estimates for Prosecutor's Decision to Seek a Death Sentence - Full Model

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | 2.4489[a] | 11.58 |
| Number of Victims | −.2635 | .77 |
| Number of Offenders | −.0171 | .98 |
| Victim - Offender Relationship | .2434 | 1.28 |
| Number of Mitigating Circumstances | −.1925 | .82 |
| Victim/Offender Race[c] | .7495[a] | 2.12 |
| Type of Weapon | .6521[a] | 1.92 |
| Total Number of Statutory Aggravating Circumstances | 1.7337[a] | 5.66 |
| Number of Felony Offenses in Addition to Murder | .9318[a] | 2.54 |
| Number of Non-statutory Aggravating Factors | 1.9430[a] | 6.98 |
| Constant | −3.6657[a] | |
| Model Classification: Percent correctly classified by the model: | | 85.10% |
| Percent correctly classified by chance: | | 53.31% |
| Proportion reduction in error relative to chance: | | 69.58% |

Table 6B: Maximum Likelihood Logit Estimates for Prosecutor's Decision to Seek a Death Sentence in South Carolina - Reduced Model

| | ML Estimate | Odds Multiplier |
|---|---|---|
| Prior Violent Record | 2.3413[a] | 10.39 |
| Type of Weapon | .5721[a] | 1.77 |
| Victim/Offender Race[c] | .8386[a] | 2.31 |
| Total Number of Statutory Aggravating Circumstances | 1.7296[a] | 5.64 |
| Number of Felony Offenses In Addition to Murder | .8959[a] | 2.45 |
| Number of Non-statutory Aggravating Factors | 1.9026[a] | 6.70 |
| Constant | −3.6337 | |
| Model Classification: Percent correctly classified by the model: | | 84.77% |
| Percent correctly classified by chance: | | 52.98% |
| Proportion reduction in error relative to chance: | | 68.57% |

[a] $p < .10$.

[b] *See supra* note b at Table 5.

[c] Coded 0 for blacks who killed blacks and 1 for all other homicide cases.

In many respects the results reported in Tables 5 and 6 are similar. Important determinants of prosecutors' decisions to seek

a death sentence were offender's prior violent record, type of weapon, statutory aggravating factors, non-statutory felonies, and non-statutory aggravating factors. No other effects were particularly important. As before, the model classification table indicates that this prosecutorial decision is modeled with reasonable accuracy, thus reducing the prediction errors substantially over chance.[171] Clearly, the combination of the offender's race and the victim's race significantly affected the decision to seek a death sentence. Even after several important and legally relevant considerations are controlled, prosecutors seem to have been disinclined to seek a death sentence when one black slayed another. Killers of whites and white killers of blacks were over ten times more likely to have the prosecutor request a death sentence than black killers of blacks. The results of Table 7 further indicate that the race of the parties influenced the prosecutors' decisions to seek a death sentence. Compared with homicides involving all other racial combinations and after other factors are controlled, black-on-white homicides were almost twice as likely to produce a death penalty request by the prosecutor.[172]

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171. As before, the model predicts true positives at about the same high rate as true negatives (79% and 89% respectively). *See supra* notes 169, 170 and accompanying text.

172. A comparison of the likelihood of death being requested for specific racial groups was informative. An additional series of logistic regressions was run in which the four-category race-of-offender or race-of-victim variable was treated as a dummy variable and included in an equation with all nine legally relevant factors. Two equations were estimated; in both, the race of offender or victim was expressed as three dummy variables. In the first equation, black-on-black killings were treated as the suppressed category. In the second equation white-on-white killings were the suppressed category. In both equations the coefficients for each race dummy variable could be expressed as the difference in intercepts between that group and the suppressed category. The magnitude and sign of the coefficient would reflect, then, the size of the enhancement or reduction in the probability of the prosecutor requesting the death penalty in comparison with the suppressed category.

The first dummy variable analysis revealed the following logit coefficients: black killed white, 1.009; white killed black, 1.298; and white killed white, .5658. In comparison with the suppressed category of black-on-black killings, and with nine legally relevant factors simultaneously controlled, black-on-white homicides were almost three times more likely to produce a death penalty request. Those in which a white killed a black were over three and one-half times more likely, and white-on-white killings were almost twice as likely to result in a death request. In the second analysis, in which the suppressed category is white-on-white slayings, the logit coefficients are: black killed black, .5658; black killed white, .44362; and white killed black, .7319. Compared with white-on-white homicides, black-on-black homicides were only one-half as likely to produce a death request. In contrast, if a black slayed a white, the prosecutor was one and one-half

Table 7A: Maximum Likelihood Logit Estimates for Prosecutor's Decision to Seek a Death Sentence - Full Model

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | 2.5042[a] | 12.23 |
| Number of Victims | −.2098 | .81 |
| Number of Offenders | .0166 | 1.02 |
| Victim - Offender Relationship | .2845 | 1.33 |
| Number of Mitigating Circumstances | −.2388 | .79 |
| Victim/Offender Race[c] | .4969[a] | 1.64 |
| Type of Weapon | .6506[a] | 1.92 |
| Total Number of Statutory Aggravating Circumstances | 1.7468[a] | 5.74 |
| Number of Felony Offenses in Addition to Murder | 1.0059[a] | 2.73 |
| Number of Non-statutory Aggravating Factors | 2.0224[a] | 7.56 |
| Constant | −3.3495[a] | |
| Model Classification: Percent correctly classified by the model: | | 85.10% |
| Percent correctly classified by chance: | | 52.65% |
| Proportion reduction in error relative to chance: | | 69.01% |

Table 7B: Maximum Likelihood Logit Estimates for Prosecutor's Decision to Seek a Death Sentence - Reduced Model

| | ML Estimate | Odds Multiplier |
|---|---|---|
| Prior Violent Record | 2.2397[a] | 9.39 |
| Type of Weapon | .5769[a] | 1.78 |
| Victim/Offender Race[c] | .5812[a] | 1.79 |
| Total Number of Statutory Aggravating Circumstances | 1.7554[a] | 5.78 |
| Number of Felony Offenses in Addition to Murder | .9786[a] | 2.66 |
| Number of Non-statutory Aggravating Factors | 2.0133[a] | 7.49 |
| Constant | −3.2599 | |
| Model Classification: Percent correctly classified by the model: | | 85.10% |
| Percent correctly classified by chance: | | 53.31% |
| Proportion reduction in error relative to chance: | | 70.60% |

[a] $p < .10$.

[b] *See supra* note b at Table 5.

[c] Coded 1 for blacks who killed whites and 0 for all other homicide cases.

times more likely to seek a death sentence. This extended dummy variable logistic regression analysis confirms and strengthens the findings reported in the text that South

The data thus far suggest that the prosecutor's decision to seek the death penalty was influenced by race and that the resulting racial disparity cannot be explained by several offense or offender characteristics. The data also reveal an interesting contextual effect: the direction and magnitude of the influence that the victim's and offender's race had on the prosecutor's decision depended upon where in the state that decision was made. In this analysis South Carolina's forty-six counties were classified as either urban or rural.[173] Urban counties were those that contained the four Standard Metropolitan Statistical Areas (SMSAs) in South Carolina: Richland, Charleston, Spartanburg, and Greenville. All other counties were designated as rural. The prosecutor's decision to seek a death sentence was then modeled separately for urban and rural counties. Logistic regression equations were estimated once for homicides committed in urban counties and again for rural homicides. These equations contain the nine legally relevant factors related to the prosecutor's decision to seek death in the combined pool of 302 cases, plus variables expressing the victim's and offender's race.

Table 8 reports the first of these logit regressions. It includes the model of prosecutorial decision making in urban counties with independent effects for the victim's and offender's race. These data suggest a revision of the earlier conclusion that the decision to seek a death sentence was independent of the offender's race. The race of both the offender and the victim were significant factors in urban prosecutors' decisions, even after legal factors were controlled. They were four times more likely to seek a death sentence in white-victim cases and, contrary to the pre-*Furman* literature, were almost eight times more likely to request death against white offenders. Independent of the victim's race, then, white offenders in urban jurisdictions were at a distinct disadvantage compared with black offenders who committed comparable crimes. Similarly,

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Carolina prosecutors were not inclined to seek the death penalty in an intra-racial black homicide, and they were substantially more inclined to do so when a white was killed, particularly if the offender was black. Furthermore, these racial differences exist even after controlling for several aggravating features of the homicides involved.

173. Although only four of forty-six counties were classified as urban, they contained approximately 44% of all felony murders committed during the study period. Thus, the marginal distributions for this variable were not skewed.

Table 8A: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Urban Counties - Full Model

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | 2.8943[a] | 18.07 |
| Number of Victims | −2.2985[a] | .10 |
| Number of Offenders | − .5016 | .61 |
| Type of Weapon | 3.3845[a] | 29.50 |
| Victim/Offender Relationship | 1.0174[a] | 2.76 |
| Race of Victim | 1.2992[a] | 3.67 |
| Race of Offender | 2.0642[a] | 7.88 |
| Total Number of Statutory Aggravating Circumstances | 2.0066[a] | 7.44 |
| Number of Felony Offenses in Addition to Murder | 1.3045[a] | 3.68 |
| Number of Non-Statutory Aggravating Factors | 2.0558[a] | 7.81 |
| Number of Mitigating Circumstances | − .3304 | .72 |
| Constant | −7.0310 | |
| Model Classification: Percent correctly classified by the model: | | 89.19% |
| Percent correctly classified by chance: | | 56.76% |
| Proportion reduction in error relative to chance: | | 75.00% |

Table 8B: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Urban Counties - Reduced Model

| | ML Estimate | Odds Multiplier |
|---|---|---|
| Prior Violent Record | 2.666[a] | 14.38 |
| Number of Victims | −2.4015[a] | .09 |
| Type of Weapon | 3.1938[a] | 24.38 |
| Victim/Offender Relationship | .9670 | 2.63 |
| Race of Victim | 1.3490[a] | 3.85 |
| Race of Offender | 1.8928[a] | 6.64 |
| Total Number of Statutory Aggravating Circumstances | 2.0334[a] | 7.64 |
| Number of Felony Offenses in Addition to Murder | 1.0672[a] | 2.91 |
| Number of Non-Statutory Aggravating Factors | 2.1732[a] | 8.79 |
| Constant | −7.2025 | |
| Model Classification: Percent correctly classified by the model: | | 90.99% |
| Percent correctly classified by chance: | | 56.76% |
| Proportion reduction in error relative to chance: | | 79.16% |

[a] $p < .10$.

[b] *See supra* note b at Table 5.

independent of the offender's race, killers of whites were at a substantial disadvantage in urban jurisdictions of South Carolina.

A decidedly different picture emerges in rural jurisdictions (Table 9). In modeling the decision of rural prosecutors to seek the death penalty, the logit regression indicates that they were responsive to many of the same case characteristics as their urban counterparts (prior record and statutory and non-statutory aggravating factors). These rural data are striking, however, because the sign of the coefficient for the race-of-offender effect is the opposite of that found for urban prosecutors. Urban prosecutors were eight times more likely to seek a death sentence against white offenders (b=2.0642), but rural prosecutors were almost twice as likely to seek the death penalty against black defendants (b=-.5265), even after controlling for legally relevant differences. This explains why the data aggregated on a statewide level (Table 5) show no race-of-offender effect; discrimination against white defendants in urban areas was counteracted by discrimination against black defendants by rural prosecutors. The adequacy or inadequacy of these statistical models does not explain this difference because their predictive accuracy is roughly comparable for both jurisdictions. These findings also do not reflect an idiosyncratic aberration since identical findings were reported by the Baldus analysis of post-*Furman* Georgia data.[174]

174. Baldus, Woodworth & Pulaski, *supra* note 85, at 1404-06.

Table 9A: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Rural Counties - Full Model

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | 2.1333[a] | 8.44 |
| Number of Victims | .4755 | 1.61 |
| Number of Offenders | .1844 | 1.20 |
| Type of Weapon | .3298 | 1.39 |
| Victim/Offender Relationship | − .0982 | .91 |
| Race of Victim | − .5172 | .60 |
| Race of Offender | − .5265 | .59 |
| Total Number of Statutory Aggravating Circumstances | 1.1637[a] | 3.20 |
| Number of Felony Offenses in Addition to Murder | .5166[a] | 1.68 |
| Number of Non-Statutory Aggravating Factors | 2.3152[a] | 10.13 |
| Number of Mitigating Circumstances | − .0197 | .98 |
| Constant | −1.6859 | |
| Model Classification: Percent correctly classified by the model: | | 84.83% |
| Percent correctly classified by chance: | | 50.34% |
| Proportion reduction in error relative to chance: | | 71.44% |

Table 9B: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Rural Counties - Reduced Model

| | ML Estimate | Odds Multiplier |
|---|---|---|
| Prior Violent Record | 2.2073[a] | 9.09 |
| Race of Victim | − .2658 | .77 |
| Race of Offender | − .6115 | .54 |
| Total Number of Statutory Aggravating Circumstances | 1.1230[a] | 3.07 |
| Number of Felony Offenses in Addition to Murder | .6614[a] | 1.94 |
| Number of Non-Statutory Aggravating Factors | 2.2944[a] | 9.92 |
| Constant | −1.1590 | |
| Model Classification: Percent correctly classified by the model: | | 82.07% |
| Percent correctly classified by chance: | | 50.34% |
| Proportion reduction in error relative to chance: | | 63.89% |

[a] $p < .10$.

[b] *See supra* note b at Table 5.

Tables 10 through 14 present a refinement of this urban-rural analysis of prosecutorial decision making by examining the effect of victim's and offender's race combinations. Table 10 presents the results of a logit regression which compares black-on-black homicides with all other racial combinations of homicides in urban jurisdictions. Table 11 presents a similar analysis for rural areas. These tables show a striking difference. Compared with black-on-black homicides, urban prosecutors were ten times more likely to seek a death sentence if the victim was white or if the offender was white. In comparison with all other homicides, then, urban prosecutors were considerably less inclined to seek capital punishment in intra-racial black murders. No such effect was observed for rural prosecutors (Table 11). The logit coefficient representing this race effect is not substantially different from zero, and the odds multiplier does not depart from 1.00.

Table 10A: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Urban Counties - Full Model

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | 2.9641[a] | 19.38 |
| Number of Victims | −1.4418 | .24 |
| Number of Offenders | − .1660 | .85 |
| Type of Weapon | 2.3909[a] | 10.92 |
| Victim/Offender Relationship | .7642 | 2.15 |
| Victim/Offender Race[c] | 2.3007[a] | 9.98 |
| Total Number of Statutory Aggravating Circumstances | 2.1018[a] | 8.18 |
| Number of Felony Offenses in Addition to Murder | .6264 | 1.87 |
| Number of Non-Statutory Aggravating Factors | 1.7139[a] | 5.55 |
| Number of Mitigating Circumstances | − .1239 | .88 |
| Constant | −6.3172 | |
| Model Classification: Percent correctly classified by the model: | | 89.19% |
| Percent correctly classified by chance: | | 56.76% |
| Proportion reduction in error relative to chance: | | 75.00% |

Table 10B: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Urban Counties - Reduced Model

| | ML Estimate | Odds Multiplier |
|---|---|---|
| Prior Violent Record | 2.8399[a] | 17.11 |
| Type of Weapon | 2.1581[a] | 8.65 |
| Total Number of Statutory Aggravating Circumstances | 1.9056[a] | 6.72 |
| Number of Non-Statutory Aggravating Factors | 1.0888[a] | 2.97 |
| Victim/Offender Race | 2.3575[a] | 10.56 |
| Constant | −5.9160 | |
| Model Classification: Percent correctly classified by the model: | | 87.39% |
| Percent correctly classified by chance: | | 56.76% |
| Proportion reduction in error relative to chance: | | 73.91% |

[a] $p < .10$.

[b] *See supra* note b at Table 5.

[c] Coded 0 for blacks who killed other blacks and 1 for all other homicide cases.

Table 11A: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Rural Counties - Full Model

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | 2.0794[a] | 8.00 |
| Number of Victims | .4557 | 1.58 |
| Number of Offenders | .1914 | 1.21 |
| Type of Weapon | .2175 | 1.24 |
| Victim - Offender Relationship | −.1416 | .87 |
| Victim/Offender Race[c] | −.0986 | .91 |
| Total Number of Statutory Aggravating Circumstances | 1.1901[a] | 3.29 |
| Number of Felony Offenses in Addition to Murder | .3780 | 1.46 |
| Number of Non-Statutory Aggravating Factors | 2.0906[a] | 8.90 |
| Number of Mitigating Circumstances | −.0909 | .91 |
| Constant | −1.9741 | |
| Model Classification: Percent correctly classified by the model: | | 82.07% |
| Percent correctly classified by chance: | | 50.34% |
| Proportion reduction in error relative to chance: | | 65.72% |

Table 11B: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Rural Counties - Reduced Model

| | ML Estimate | Odds Multiplier |
|---|---|---|
| Prior Violent Record | 2.0940[a] | 8.12 |
| Victim/Offender Race | .1039 | 1.11 |
| Total Number of Statutory Aggravating Circumstances | 1.164[a] | 3.20 |
| Number of Non-Statutory Aggravating Factors | 2.0218[a] | 7.55 |
| Constant | −1.8313 | |
| Model Classification: Percent correctly classified by the model: | | 81.38% |
| Percent correctly classified by chance: | | 51.03% |
| Proportion reduction in error relative to chance: | | 66.67% |

[a] $p < .10$.

[b] *See supra* note b at Table 5.

[c] Coded 0 for blacks who killed other blacks and 1 for all other homicide cases.

Tables 12 and 13 compare the probability that urban and rural prosecutors would seek a death sentence in black-on-white killings with the likelihood that they would seek death in all others. When read in conjunction with Tables 10 and 11, these

tables reveal that the *form*, rather than the presence or magnitude of racial discrimination, differentiated urban and rural prosecutors. Although urban prosecutors were particularly unlikely to seek a death sentence if a black offender slayed a black victim (Table 10), they were not more inclined to do so, compared with all other cases, if the offender was black and the victim was white (Table 11). In both the full nine-variable and the more parsimonious models, the effect of the race variable is nil, even though the overall model has good predictive accuracy (Table 12).

Table 12A: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Urban Counties - Full Model

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | 3.1415[a] | 23.14 |
| Number of Victims | −.8867 | .41 |
| Number of Offenders | −.0810 | .92 |
| Type of Weapon | 2.2813[a] | 9.79 |
| Victim - Offender Relationship | 1.2168[a] | 3.38 |
| Victim/Offender Race[c] | −.0670 | .94 |
| Total Number of Statutory Aggravating Circumstances | 1.8496[a] | 6.36 |
| Number of Felony Offenses in Addition to Murder | .9692 | 2.64 |
| Number of Non-Statutory Aggravating Factors | 1.7528[a] | 5.77 |
| Number of Mitigating Circumstances | −.0616 | .94 |
| Constant | −4.9921 | |
| Model Classification: Percent correctly classified by the model: | | 90.09% |
| Percent correctly classified by chance: | | 57.66% |
| Proportion reduction in error relative to chance: | | 78.26% |

Table 12B: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Urban Counties - Reduced Model

| | ML Estimate | Odds Multiplier |
|---|---|---|
| Prior Violent Record | 3.1814[a] | 24.08 |
| Type of Weapon | 1.9618[a] | 7.11 |
| Victim - Offender Relationship | 1.4723[a] | 4.36 |
| Total Number of Statutory Aggravating Circumstances | 1.7782[a] | 5.92 |
| Number of Non-Statutory Aggravating Factors | 1.1727[a] | 3.23 |
| Victim/Offender Race | .3762 | 1.46 |
| Constant | −5.0735 | |
| Model Classification: Percent correctly classified by the model: | | 88.29% |
| Percent correctly classified by chance: | | 55.86% |
| Proportion reduction in error relative to chance: | | 75.00% |

[a] $p < .10$.

[b] *See supra* note b at Table 5.

[c] Coded 1 for blacks who killed whites and 0 for all other homicide cases.

Rural prosecutors, however, were influenced by this racial combination of offender and victim (Table 13). Compared with

all other felony homicides committed in their jurisdictions, rural prosecutors were twice as likely to seek the death penalty when a black slayed a white. Again, this greater inclination to seek the maximum sentence cannot be attributed to differences in the severity or aggravation of homicides committed, at least in terms of those factors examined here. Nor is the observed race effect merely an artifact of a poorly specified statistical model, since all the models demonstrate better than reasonable accuracy. Instead, this logistic regression analysis shows consistent evidence of racial disparity in prosecutorial decision making with the form of racial disparity varying according to the region of the state in which that decision was made.[175]

175. A comparison of specific racial groups confirms and expands these results. A dummy variable logistic regression analysis identical to that previously reported, *supra* note 172, was conducted, once within the subset of urban cases and again for rural homicides. This analysis further reveals the different form that racial discrimination took in the two areas. The difference in the probability between black-on-black and black-on-white homicides that the prosecutor would seek a death sentence was twice as large in urban jurisdictions. While rural prosecutors were one and one-half times more likely to seek a death sentence if a black killed a white rather than another black, urban prosecutors were almost four times more likely to seek the death penalty. This pattern of death requests reflects two processes. First, prosecutors in urban areas were exceedingly unlikely to seek a death sentence if a black slayed another black. Black-on-black homicides made up approximately one-third of all the felony homicides in urban areas, but only 6% of all death requests. In fact, the lowest probability of a death request in the state was for a black killing another black in an urban area (2/38=.053). Second, prosecutors in rural areas were particularly likely to seek a death sentence for a black who killed a white. Black-on-white homicides made up only 46% of all rural felony homicides, but comprised over 80% of the death requests. The probability that a rural prosecutor would seek a death sentence in a black-on-white killing was almost twice as high as for urban prosecutors, even though the overall aggravation of black-on-white homicides in urban areas (determined by the aggravation index, *supra* note 162) was generally greater than those committed in rural areas.

Table 13A: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Rural Counties - Full Model

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | 2.1389[a] | 8.49 |
| Number of Victims | .2872 | 1.33 |
| Number of Offenders | .0596 | 1.06 |
| Type of Weapon | .0601 | 1.06 |
| Victim/Offender Relationship | − .3832 | .68 |
| Victim/Offender Race[c] | .6813 | 1.98 |
| Total Number of Statutory Aggravating Circumstances | 1.1468[a] | 3.15 |
| Number of Felony Offenses in Addition to Murder | .5056[a] | 1.66 |
| Number of Non-Statutory Aggravating Factors | 2.2137[a] | 9.15 |
| Number of Mitigating Circumstances | − .1049 | .90 |
| Constant | −2.0813 | |
| Model Classification: Percent correctly classified by the model: | | 81.38% |
| Percent correctly classified by chance: | | 51.03% |
| Proportion reduction in error relative to chance: | | 63.22% |

Table 13B: Maximum Likelihood Logit Estimates for the Prosecutor's Decision to Seek a Death Sentence in Rural Counties - Reduced Model

| | ML Estimate | Odds Multiplier |
|---|---|---|
| Prior Violent Record | 2.0989[a] | 8.16 |
| Victim/Offender Race | .6318[a] | 1.88 |
| Total Number of Statutory Aggravating Circumstances | 1.1123[a] | 3.04 |
| Number of Felony Offenses in Addition to Murder | .6418[a] | 1.90 |
| Number of Non-Statutory Aggravating Factors | 2.1120[a] | 8.26 |
| Constant | −2.2326 | |
| Model Classification: Percent correctly classified by the model: | | 81.38% |
| Percent correctly classified by chance: | | 49.66% |
| Proportion reduction in error relative to chance: | | 63.89% |

[a] $p < .10$.

[b] *See supra* note b at Table 5.

[c] Coded 1 for blacks who killed whites and 0 for all other homicide cases.

*3. Overall Aggravation Analysis of Racial Discrimination.* The preceding analysis focused on the effect of race on the pros-

ecutors' decisions to seek a death sentence after controlling simultaneously for several factors found to be individually correlated with that decision. A related way to examine the influence of race is to estimate the magnitude of racial differences for offenses that are comparable in terms of their overall level of aggravation. In this procedure the general level of severity for each homicide is first estimated. Then offenses are classified into groups with equivalent degrees of aggravation. The cases within each group can be thought of as comparable or "similar crimes," and the effect of race can then be estimated within these groups.

This analysis is reported in Table 14. The overall level of aggravation for each homicide was estimated from the aggravation scale discussed previously, and each case was placed into one of five groups of equal score intervals.[176] The probability that prosecutors would seek the death penalty was then calculated for each racial group in each of the five levels. The first panel shows quite clearly that the race-of-victim effect observed in the logistic regression analysis persists, but within a limited range of cases. At the lowest two levels of aggravation, which contain 67% of all felony homicide cases and 25% of all death penalty requests, prosecutors were twice as likely to request a death sentence if the victim was white. At the highest three levels of aggravation, however, no race-of-victim effect can be found. At these three levels considered together, a death sentence was requested in a very high proportion of both white-victim (84%) and black-victim (92%) cases.

The second panel of Table 14 reveals a complex relationship between the offender's race and the prosecutor's decision to seek a death sentence. At the lowest levels of aggravation a prosecutor was more likely to seek a death sentence against a white offender, while at the highest levels of aggravation (levels 4 and 5) treatment of white and black offenders was not meaningfully different. This result can be better understood by examining the victim's race in each aggravation level, and the likelihood of having the death penalty sought in different offender and victim racial combinations.

176. *See supra* note 162 and accompanying text.

Table 14: Probability of Prosecutor Seeking the Death Penalty for Capital Murder in South Carolina by Racial Characteristics of the Homicide and Level of Aggravation

| | | LEVEL OF AGGRAVATION | | | | |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| Death Requested | White Victim | .071 (6/85) | .405 (17/42) | .758 (25/33) | .895 (34/38) | .882 (15/17) |
| | Black Victim | .036 (2/55) | .200 (4/20) | .833 (5/6) | 1.00 (4/4) | 1.00 (2/2) |
| | Ratio[a] | 1.97 | 2.02 | .91 | .90 | .88 |
| Death Requested | Black Offender | .034 (3/89) | .317 (13/41) | .889 (16/18) | .957 (22/23) | .917 (11/12) |
| | White Offender | .098 (5/51) | .381 (8/21) | .667 (14/21) | .842 (16/19) | .857 (6/7) |
| | Ratio | .347 | .83 | 1.33 | 1.14 | 1.07 |
| Death Requested | All Others | .076 ( 7/92) | .409 (18/44) | .750 (27/36) | .800 (36/40) | .889 (16/18) |
| | Black Kills Black | .021 ( 1/48) | .167 ( 3/18) | 1.00 ( 3/3) | 1.00 ( 2/2) | 1.00 ( 1/1) |
| | Ratio | 3.61 | 2.45 | .75 | .90 | .89 |
| Death Requested | Black Kills White | .049 (2/41) | .435 (10/23) | .867 (13/15) | .952 (20/21) | .909 (10/11) |
| | All Others | .061 (6/99) | .282 (11/39) | .708 (17/24) | .857 (18/21) | .875 (7/8) |
| | Ratio | .80 | 1.54 | 1.22 | 1.11 | 1.04 |
| Death Requested | Black Kills White | .049 (2/41) | .435 (10/23) | .867 (13/15) | .952 (20/21) | .989 (10/11) |
| | Black Kills Black | .021 (1/48) | .167 (3/18) | 1.00 (3/3) | 1.00 (2/2) | 1.00 (1/1) |
| | Ratio | 2.33 | 2.60 | .867 | .952 | .909 |

[a] The ratios represent the comparison between the following sets of racial characteristics; white to black victims, black to white offenders, all homicides to those where a black offender killed a black, homicides involving black offenders with white victims to all other felony murders, homicides involving black offenders with white victims to those involving black offenders with black victims.

The third and fourth panels of Table 14 reveal that, compared with homicides involving other racial combinations, prosecutors were particularly unlikely to seek a death sentence when

a black killed another black, *but only at lower levels of aggravation.* Of 72 black-on-black homicides, 92% are at the lowest two levels of aggravation. At these levels, a death sentence was requested in fewer than one in ten instances (4/66=.06), but a death sentence was sought three times as often in homicides between other racial combinations at comparably low levels of aggravation. Of the 8% (n=6) of black-on-black homicides at the highest three levels of aggravation, however, all resulted in a request for the death penalty, and were treated similarly to white-victim and white-on-black homicides at comparable levels of aggravation. Of the 89 black-offender murders at the lowest level of aggravation (second panel of Table 14), over one-half were committed against a black victim, while only 14% of whites at that level killed a black. Thus, one reason white offenders appear to have experienced a disadvantage at the lower level of homicide aggravation is that black offenders were more likely than white offenders to kill a black victim, and black-on-black homicides were less likely to result in a death request than any other homicide.

The fourth panel of Table 14 shows that, compared with all other homicides, black-on-white homicides were more likely to produce a death request at the lower levels of homicide aggravation, except those in the lowest aggravation level. Furthermore, once black-on-white homicides crossed a threshold of aggravation at about level 3, prosecutors treated them no differently than other homicides. The finding that at the lowest level of aggravation a black-on-white homicide was somewhat less likely than all other homicides to result in the death penalty request may be initially perplexing. This finding, however, results partially from the effect that white-on-white homicides had on the likelihood of a death request at the lowest level of aggravation. Of the 99 homicides not involving a black offender and white victim at the lowest level of aggravation, approximately 44% were white-on-white homicides and 48% were black-on-black. The probability of a death request in white-on-white murders was over four times greater than a death request in black-on-black killings at this level of aggravation. If white-on-white killings are excluded from level one, the probability of a death request diminishes to .036, less than that found for black-on-white killings. This suggests, then, that at the lowest level of aggravation the likelihood of a death request for a white who killed an-

other white was .091. This is almost twice the likelihood of a death request at the same level of aggravation if the offender was black and the victim was white (.049), and over four times the likelihood for black-on-black killings (.021).

The final panel of Table 14 compares inter- and intra-racial black homicides at each level of aggravation. These data reveal a familiar pattern. Prosecutors were over twice as likely to seek a death sentence when a black murdered a white than when a black killed another black, but only at lower levels of aggravation. When a black-on-black homicide reached the third level of aggravation, the prosecutor treated it similarly to a black-on-white homicide.

These findings are confirmed in a series of logit analyses of high and low aggravation cases. Within the two levels of low aggravation cases (n=202), the effect of the victim's race (holding constant the offender's race) is positive and significant (b=.8710), and indicates that prosecutors were almost two and one-half times more likely to seek the death penalty in white-victim killings than in black-victim killings. The offender's race is nonsignificant among these low aggravation cases, and the odds multiplier is not substantially different from one (1.18). In high aggravation cases (n=100), however, the effect of the victim's race is negative but nonsignificant. For the most aggravated felony homicides, then, the prosecutors made the decision to seek a death sentence without considering the victim's race. In this equation, however, the effect of the offender's race is significant (b=-1.3362). The sign of the coefficient suggests that at the highest levels of homicide aggravation, with the victim's race held constant, prosecutors were almost four times more likely to seek a death sentence against black than against white offenders.

These data confirm both sets of findings from the earlier analyses. Because the likelihood of a death request increased as the aggravation of the homicide increased, one may conclude that South Carolina prosecutors selected death cases, in part, in a meaningful, rational way. Once a homicide crossed a certain threshold of aggravation, prosecutors regularly sought death sentences, and treated white-victim and black-victim cases similarly (although black offenders were discriminated against). At lower levels of aggravation, however, when the circumstances of the case were not so shocking as to "shake the conscience of the

community,"[177] the victim's race substantially influenced prosecutors' decisions to seek the death penalty. At these low levels of aggravation, which included a large proportion of felony murders (67%) and a significant number of death penalty requests (25%), prosecutors were substantially more likely to request a death sentence if a white was killed.

The data also reveal a two-tier stage of homicide aggravation: one for the killing of a white, and a separate, more tolerant one for the killing of a black. The first and last panels of Table 14 show that fewer than 10% of the homicides at the lowest level of aggravation resulted in the prosecutor seeking a death sentence, regardless of race or racial combination. This probability increased dramatically at the very next aggravation level, but only for white-victim homicides. At this level, prosecutors sought the death penalty in 40% of the killings of white victims but in only 20% of black-victim murders, and in only 17% of those in which the defendants were blacks. Not until the third level of aggravation did the probability of a death sentence request for a black-victim homicide become comparable to that of white-victim killings. Indeed, the increase in the likelihood that the prosecutor would seek the death penalty between aggravation levels two and three was a factor of less than two for white-victim homicides (.405 - .758) and more than four for black-victim cases (.200 - .833). Prosecutors more often sought death sentences in less aggravated white-victim homicides than in black-victim killings. These data clearly suggest that South Carolina prosecutors were operating with a race-specific definition of homicide severity. They appear to have tolerated greater aggravation when the victim was black than when the victim was white, and when a black was slain, prosecutors regularly sought a death sentence only in a homicide of more than normal aggravation.

These findings are particularly disturbing for two reasons. First, the procedural reforms in the 1977 Act did not address the prosecutor's discretion in deciding when to seek the death penalty. Neither subsequent statutory revisions nor case law attempt to structure or limit the power of the prosecutor in making this decision or in monitoring the results once such decisions

177. State v. Adams, 279 S.C. 228, 241, 306 S.E.2d 208, 215, *cert. denied*, 464 U.S. 1023 (1983).

are made.[178] These data indicate, then, the presence of racial disparity in treatment at precisely the point where procedural protections and remedies are their weakest. Second, since the prosecutor's decision to seek a death sentence is one of the first critical decision points in the legal process of capital punishment, it can shape the form and appearance that racial disparity may take at later points.[179]

### *B. Capital Sentencing*

The data analyses conducted in the preceding sections suggest that one by-product of unguided and unmonitored prosecutorial discretion under the 1977 Act was that prosecutors' decisions to seek a death sentence were influenced by the race of the offender and victim. The influence of race, however, was complex and was contingent upon the aggravation of the homicide and the jurisdiction in which it occurred. The focus now turns to a second discretionary decision—the decision of the sentencer to impose a death sentence. The 1977 Act allows the decision to sentence a convicted capital murderer to death only after an affirmative finding of at least one statutory aggravating circumstance. Even if one or more aggravating circumstances are found, however, the sentencer, under the South Carolina statute, may, with discretionary authority, extend mercy and sentence the defendant to life without explicitly finding any mitigating circumstance.[180] Since 1975 the trend in both federal law and South Carolina law has been to expand the sentencer's discretion to impose a life or death sentence.[181] Within this

178. In the first case reviewed under the new death statute, the South Carolina Supreme Court rejected the appellant's claim that unguided prosecutorial discretion invalidated the statute. State v. Shaw, 273 S.C. 194, 204, 255 S.E.2d 799, 804, *cert. denied*, 444 U.S. 957 (1979). The court held that, in general, unrestricted discretion in the hands of the prosecutor was not a constitutional infirmity and, specifically, the prosecutor's decision to extend mercy to one defendant by accepting a plea bargain did not render the statute invalid. For an extended discussion, see Hubbard, Burry & Widener, *supra* note 143.

179. *See supra* note 155 and accompanying text.

180. For a complete review of South Carolina capital sentencing procedures and applicable state law, see Hubbard, Burry & Widener, *supra* note 143.

181. In 1978 the Supreme Court held that a state could not preclude sentencers from considering as a mitigating factor "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (footnote omitted).

realm of expanded discretion in the sentencing decision the exercise of extra-legal factors, such as race, may be found.

Any empirical discussion of capital sentencing in South Car-

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*Lockett* requires the sentencer to hear evidence that might reduce the defendant's culpability for murder. *See* Enmund v. Florida, 458 U.S. 782, 798 (1982); Eddings v. Oklahoma, 455 U.S. 104, 126 (1982). Indeed, this includes any evidence that admits of the defendant's redeeming character, even if it concerns attitudes or behavior arising after the murder. Skipper v. South Carolina, 476 U.S. 1 (1986). Weisberg recently observed that *Lockett* requires the penalty trial to become "the depository of all the determinant explanations of the defendant's behavior which lie outside the normal rules of insanity, diminished capacity, or provocation." Weisberg, *supra* note 9, at 324. In four cases in its 1982 Term, the Supreme Court further expanded the range of information that could be heard at a penalty trial. In Zant v. Stephens, 462 U.S. 862 (1983), the Court approved a Georgia death sentence handed down even though one of the aggravating circumstances upon which it relied was subsequently held unconstitutional by the state supreme court. The Court made clear its "threshold theory" of an aggravating circumstance. Making an analogy between capital sentencing and a pyramid, the Court noted that once at least one aggravating circumstance is found by the sentencer the case reaches the apex of the pyramid at which the sentencer has unguided discretion in selecting the penalty. *See supra* note 6. In Barefoot v. Estelle, 463 U.S. 880 (1983), the Court held that the State may introduce expert testimony about an offender's likely violent behavior in the future, even though such predictions have been demonstrated to be unreliable. In doing so, the Court implied that it was not as much interested in what is heard at the penalty phase as it was interested in regulating the *procedures* by which it becomes known. In California v. Ramos, 463 U.S. 992 (1983), the Court further widened the discretion of penalty phase decision making by upholding the "Briggs instruction" to California juries that a sentence of life without parole may be commuted by the governor. Finally, in Barclay v. Florida, 463 U.S. 939 (1983), the Court reiterated both its belief in the mere threshold function of aggravating circumstances and its belief that advanced stages in capital sentencing should be unguided. In *Barclay* the Court approved a death sentence imposed by a Florida judge against a jury's recommendation of life imprisonment, even though one of the aggravating circumstances used by the judge to justify the death sentence was not provided by Florida statute. For a detailed discussion of the evolution of penalty phase testimony and evidence in federal constitutional law, see Weisberg, *supra* note 9 and Winick, *supra* note 63.

South Carolina courts have been equally generous in extending both unguided discretion at advanced sentencing stages and information available to sentencers at the penalty phase. In *Shaw* the supreme court approved the penalty hearing introduction into evidence of photographs depicting post-mortem abuse of the victim. Although noting that such evidence does not constitute a factor in aggravation according to the statute, the court admitted it as evidence of the defendant's character. 273 S.C. at 209, 255 S.E.2d at 806. The court also allows the acts of co-conspirators to be entered as evidence in a penalty deliberation. State v. Woomer, 276 S.C. 258, 265, 277 S.E.2d 696, 699-700 (1981), *cert. denied*, 463 U.S. 1229 (1983). South Carolina also has allowed the defense to submit non-statutory factors in mitigation, so long as they reflect "any aspect of defendant's character or record and any circumstances of the offense proffered as a basis for a sentence less than death which are supported by competent evidence." State v. Linder, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981). For a comprehensive treatment of penalty phase testimony under South Carolina law, see Hubbard, Burry & Widener, *supra* note 143.

olina during the period in question, 1977 through 1981, warrants a strong cautionary note of introduction. From June 8, 1977, until December 31, 1981, only 26 death sentences were handed down, and this limits the kinds of analyses that can be undertaken and the strength of any conclusions that can be drawn. Predicting rare events, such as the imposition of a death sentence, weakens the efficiency of estimated effects. As a result of this statistical inefficiency the standard errors are larger than when predicting more frequently occuring events.

*1. Preliminary Findings.* Of the 302 felony murders committed between 1977 and 1981, 135 (45%) resulted in a murder conviction or nonnegligent manslaughter, and of these 135 cases, only 26 (14%) resulted in a death sentence. The death penalty can be imposed only if the prosecutor first files an intention to do so; a death sentence was handed down 26 times out of the 114 (23%) times it was requested.[182] Clearly, then, sentencers in South Carolina freely exercised the discretion provided to them, imposing a death sentence in about a quarter of the cases in which they could have done so.

Table 15 reports a preliminary analysis of these data. It shows the probability that a death sentence would be imposed on a convicted defendant by various racial characteristics of the victim and offender. The data suggest that, unlike prosecutors' decisions to seek a death sentence, the sentencers' decisions were influenced by the race of the offender. Contrary to the pre-*Furman* literature, however, these findings indicate that white defendants were at a disadvantage. Disregarding the victim's race, convicted white offenders were over three times more likely to be sentenced to death than were convicted black defendants. The data also show that, contrary to the earlier decision to seek a death sentence, the decision to impose a death sentence was more likely for one who killed a black than for one who killed a white. When racial combinations of offender and victim are considered, a somewhat similar pattern emerges. The lowest probability of a death sentence being imposed was for blacks convicted of killing blacks ($p=.083$). Contrary to previous find-

182. This is somewhat misleading because in several instances a notice to seek the death penalty was withdrawn after a negotiated plea of guilty was accepted. In an unknown number of cases, then, the notification to seek death may have been a ploy to enhance a plea bargain.

ings on the prosecutor's decision to seek a death sentence, no large race-of-victim effect existed between blacks who killed blacks and blacks who slayed whites (p's=.083, .095, respectively; ratio=1.14).

Table 15: Probability of Death Sentence Being Imposed for Felony Murder in South Carolina by Race of Offender and Victim - Murders Which Resulted in a Conviction

| | | (Cases) | Probability | Ratio |
|---|---|---|---|---|
| Death Imposed | White Offender | (19/60) | .317 | 3.41 |
| | Black Offender | ( 7/75) | .093 | |
| | White Victim | (20/116) | .172 | 1.84 |
| | Black Victim | ( 6/19) | .316 | |
| | Black Kills Black | ( 1/12) | .083 | |
| | Black Kills White | ( 6/63) | .095 | |
| | White Kills Black | ( 5/7) | .714 | |
| | White Kills White | (14/53) | .264 | |
| | Black Kills Black | ( 1/12) | .083 | 2.44 |
| | All Others | (25/123) | .203 | |
| | Black Kills White | ( 6/63) | .095 | 2.93 |
| | All Others | (20/72) | .278 | |
| | Black Kills Black | ( 1/12) | .083 | 1.14 |
| | Black Kills White | ( 6/63) | .095 | |

These findings are initially perplexing because black killers of whites were almost four times more likely to have the death penalty requested, but no more likely to have the death penalty imposed than were those who killed blacks. Black killers of whites were the most likely racial combination to have the death penalty requested (about one-half of the time), while black killers of blacks were the least likely (about 14% of the time; see Table 1). In comparison with the probability of a death sentence being requested, however, the probability of a death sentence being imposed for black-on-white killings declined by 40% (.495 to .094), while the difference between the probability of sentence requests and impositions declined only 6% (.139 to .083) for black-on-black killings. The difference between the probability that a death sentence would be requested and the probability

that it would be imposed was highest for black-on-white killings (compare Table 1 with Table 15). Although no data confirm this, these findings are compatible with the suggestion that local prosecutors were more inclined to file an intent to seek the death penalty when black offenders killed white victims than in other homicides, even when prosecutors lacked the requisite evidence to prove a capital murder case. Since prosecutors need not demonstrate evidence sufficient to prove an aggravating circumstance when filing a notification to seek death, their requests in many black-on-white killings may have been little more than posturing.

Unfortunately, the data are both too meager and too complex to be satisfied by such a simple, if intuitively reasonable, explanation. Nonetheless, the form of racial disparity at the sentencing stage was very different than that found at the prosecutorial decision making stage and, therefore, deserves attention. Specifically, the dramatic difference according to victim's race, which appears at one point but not another, warrants an explanation. Again, the reader should recall that relatively few death sentences were imposed during the study period (26), and fewer still were imposed in black-victim cases (only 6). These may be too few to permit a clear and unambiguous analysis, and more importantly, this small number of cases may produce patterns uncharacteristic of the process generally. With this caveat in mind, some tentative explanations of these findings emerge.

One simple reason for these findings may be that racial discrimination evident at one stage in the process of death cases was cured at later stages. South Carolina sentencers may have been less sensitive to race than prosecutors. They also may have been less free to express any prejudice because, unlike prosecutors, they were restricted by statutory guidelines. There are three reasons to be skeptical of both of these hypotheses, however. First, the data suggest that racial disparity in capital sentencing did not disappear at the penalty phase, but merely changed form. Second, no a priori reason supports a belief that sentencers in South Carolina (juries of lay persons) were less sensitive to the victim's race than were legal professionals. In fact, ample social psychological evidence suggests that people in general empathize with, and are more sensitive to, members of

their own race.[183] Third, as already suggested, although the necessity to find affirmatively an aggravating circumstance before sentencing a defendant to death restricts the discretion of post-*Furman* capital sentencing, once that finding has been made, doctrinal revision of the penalty phase of capital sentencing has in effect increased jurors' discretion and opportunity to express extra-legal attitudes.[184] Thus, a few reasons exist—either attitudinal or legal—to expect capital sentencers to be more likely to vent racial feelings when determining who should live or die. Why, then, was there a different race-of-victim effect at this point?

An answer to this question may lie in the kinds of cases that reached the point of sentencing. As mentioned earlier, a problem in conducting sentencing research is sample selection bias:[185] because of prosecutors' uneven filtering of cases according to race, patterns of racial disparity may be different at earlier decision making points. If, for instance, prosecutors seek death sentences only in the most aggravated black-victim homicides, but are less selective in requesting a death sentence for killers of whites, then sentencers as a whole will be confronted with two different pools of cases. The black-victim pool will contain only the most egregious homicides, but the white-victim pool will have been selected from and will include a larger expanse of the distribution of aggravation. Even if sentencers explicitly disregard the victim's race, race will still influence the ultimate decision since some killers of whites will be sentenced to death for homicides that would have resulted in a life sentence had the victim been black.

Such a process of sample selection appears to be operating in these South Carolina data. The data have already shown that local prosecutors were less inclined to seek a death sentence in a black-victim murder than in a white-victim murder, even after several aggravating and mitigating factors are controlled in the analysis (Tables 5, 6, and 14). This reluctance characterized

183. Emswiller, Deaux & Willits, *Similarity, Sex, and Requests for Small Favors*, 1 J. APPLIED SOC. PSYCHOLOGY 284 (1971); Gaertner & Bickman, *Effects of Race on the Elicitation of Helping Behavior: The Wrong Number Technique*, 20 J. PERSONALITY & SOC. PSYCHOLOGY 218 (1971).

184. *See supra* note 181 and accompanying text.

185. *See supra* note 51 and accompanying text.

prosecutorial treatment of black-victim homicides until they crossed a certain level of aggravation that was higher than that tolerated for killers of white victims (Table 14). These same prosecutors selected white-victim cases from throughout the distribution of white-victim cases. Thus, prosecutors requested the death penalty for low, middle, and high aggravation white-victim cases, but for only the most aggravated black-victim cases.

Another way to express this differential treatment of white- and black-victim cases by prosecutors is available. The distribution of these felony homicides along the scale of aggravation was approximately normal. For both white- and black-victim killings only a few were at the low aggravation level, and only a small proportion of each were at the most extremely aggravated end; most cases fell in the middle range. The largest proportion of black-and white-victim cases that result in a death penalty request were taken from the serious end of the distribution. The distribution of black-victim cases that resulted in a death penalty request, however, was concentrated more heavily on the serious end. The mean or average aggravation score for black-victim death requests was over one and one-half standard deviation units away from the black-victim mean, while the mean for white-victim death requests was within three-fourths of a standard deviation unit from the white-victim mean. This evidence further suggests that those cases that reached the point of sentencing had already been subjected to a biased filtering process. Prosecutors had already excluded all but the most serious black-victim killings, but had excluded only the least aggravated white-victim homicides.[186] The problem of sample selection bias does, then, characterize these data and may, in part, explain why black-victim racial disparity found at the prosecution stage did not appear at sentencing. This also clearly suggests that capital sentencing research must examine decision making at several points throughout the process. To do less can lead to seriously misinformed results.

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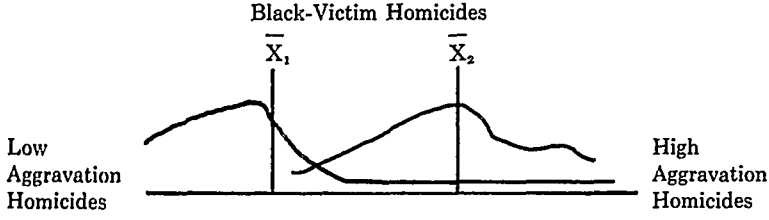
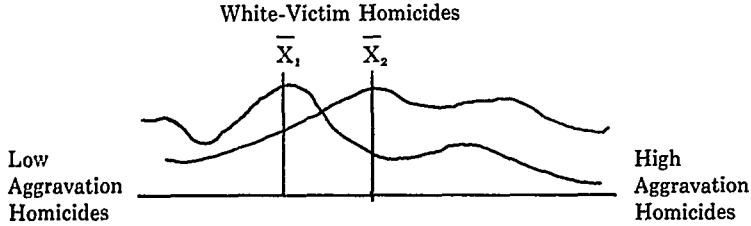
186. Perhaps a diagram can illustrate this point with greater clarity. The following is the distribution of aggravation scores for black-victim cases, with low aggravation scores at the left end or tail of the distribution and high aggravation scores at the right tail. Two distributions and the mean of each distribution are shown for the aggravation scores of all black-victim killings ($x_1$) and for the subgroup that resulted in death penalty requests ($x_2$).

A second filtering process may be operating in these data. By comparing Table 15 with Table 1 the overall conviction rate for homicide or nonnegligent manslaughter in felony murders and in various racial subgroups can be estimated. As reported earlier, approximately 45% of the 302 felony murders resulted in a homicide or nonnegligent manslaughter conviction. This overall conviction rate, however, obscures critical differences in conviction rates for different race groups. For example, the overall conviction rate in white-victim felony homicides (54%) was slightly greater than the overall rate, but the conviction rate for black-victim felony homicides was *substantially less* than the overall 45% rate.

The conviction rate for different combinations of offender's and victim's race was even more remarkable. The highest conviction rate was for blacks who killed whites (63/111=.568), but




Two things are clear from these distributions. First, most cases in which the death penalty was requested are far out on the serious or most aggravated tail of the distribution. Second, the mean aggravation score for death penalty cases is a distance of one and one-half standard deviation units away from the overall mean for black-victim killings. The next two distributions illustrate the same phenomena for white victim-killings.




This table shows that death penalty requests in white-victim cases were selected from a larger part of the overall distribution of white-victim cases and not just from the most aggravated end. The mean aggravation score for white-victim death penalty request cases ($x_2$) is not substantially different (a little more than one-half a standard deviation) from the overall mean for white-victim killings ($x_1$). This suggests that prosecutors requested the death penalty in only the most aggravated black-victim cases but in low, medium, and high aggravation white-victim cases.

this was only slightly higher than that for whites who killed whites (53/104=.510) and for whites who killed blacks (7/15=.467). The conviction rate for blacks who killed whites, however, was almost three and one-half times the conviction rate of blacks who killed other blacks (12/72=.167). While almost 60% of black-on-white homicides resulted in a conviction, only 17% of blacks accused of killing blacks were convicted. The data also indicate that, not only were black-victim homicides unlikely to result in a conviction, but also those that did result in convictions were the most aggravated crimes; white-victim homicides that resulted in a homicide conviction, however, included cases from a greater range of aggravation.

In sum, the sentencing data reported here must be viewed with great caution. Not only were black-victim homicides subject to sample selection bias at the point of the prosecutor's decision to seek a death sentence, but also they were less likely to result in a conviction than were white-victim homicides. Moreover, black-victim homicides resulting in a conviction were likely to be more aggravated than white-victim killings resulting in a conviction.

With this in mind, the effect of race on the sentencer's decision to impose a death sentence can be viewed with appropriate caution. This analysis addresses the effect that race may have had on the sentencing decision after first simultaneously controlling for several legally relevant factors that may have influenced the decision. Similar to the analysis of the decision to seek the death penalty, this multivariate analysis of the decision to impose a death sentence is conducted with a logistic regression. This logistic regression equation includes as explanatory factors the nine aggravating and mitigating variables employed in previous logistic regressions, plus the race of victim and offender. The outcome variable is the dichotomous decision of whether to sentence an offender to death or to impose some other punishment. Since the data include only 26 death sentences, and only 6 imposed in black-victim cases, the analysis can include neither specific subgroup comparisons nor the effect of race in urban and rural jurisdictions or within comparable aggravation levels as in Table 14. The strength of the conclusions from the sentencing data is, therefore, substantially less than for the data on seeking a death sentence.

*2. Regression Analysis of Racial Discrimination and the*

*Sentencing Decision.* Table 16 presents the results of a logistic regression analysis in which the outcome variable is the decision to impose a death sentence and the explanatory factors include nine aggravating and mitigating circumstances.[187] In this analysis the race of the victim and of the offender are treated as having independent effects. These data present both interesting similarities and differences with those reported in Table 5.[188] Similar to the prosecutor's decision making process in seeking a death sentence, the decision to sentence a defendant to death was influenced by several aggravating characteristics of the act.

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187. Mitigating circumstances refer to factors about the offender or the offense that may have reduced the offender's culpability or the offense's brutality and which were recorded in the SHR, police incident report, or trial transcript. Typically they included offender information such as the extent of alcohol or drug involvement at the time of the offense, age, intelligence, or mental or emotional impairment, and whether the offender surrendered or assisted law enforcement officers. Much less often they included offense information such as the victim's own participation in the crime. In determining the presence of a mitigating circumstance, the testimony of the defendant's character witnesses presented at the penalty phase of capital trials was not considered. In post-*Lockett* cases, if there was a penalty trial, the bulk of the testimony consisted of the litany of character witnesses that the defendant was a good father, provider, or son or a battered, abused, or neglected child. *See* SOUTHERN POVERTY LAW CENTER, TRIAL OF THE PENALTY PHASE (1981); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. REV. 299 (1983).

188. As in the analysis of the prosecutor's decision to seek a death sentence, the results of the logistic regression can be used to predict the probability of a death sentence being *imposed* in cases with different combinations of aggravating and mitigating circumstances. The modeling of the sentencing decision suggests that a homicide involving two aggravating felonies, such as kidnapping and rape, committed against a lone stranger by one defendant would have the following logit equation for the imposition of a death sentence (DS) (*See* Table 16):

$$DS = -2.3180 + (.3484)(0) + 1.2252(0) + .6495(0) + .0422(1) + (-1.0734)(0) + (-.0069)(0) + .8645(1) + .7019(0) + .9595(0)$$

$$DS = -2.3180 + .0422 + .0422 + .8645$$

$$DS = -1.4113$$

The logit prediction is -1.4113, which is the predicted log of the odds of a death sentence being imposed on the hypothetical defendant above. It corresponds to a predicted probability of .196 $(1\text{-}P)=1/(1+e^{XB})$ that the death penalty would be imposed in such a case. *See supra* note 161. For a more egregious homicide by two defendants who kidnap, rob, and brutally slay two victims who are known to the defendants, the log of the odds of a death sentence being imposed becomes:

$$DS = 2.3180 + 1.2252 + .6495 + .8645 + .9595$$

$$DS = 1.3807$$

This corresponds to a predicted probability of .799 that a death sentence would be imposed.

Table 16A: Maximum Likelihood Logit Estimates for the Decision to Impose a Death Sentence in South Carolina

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Prior Violent Record | −.3481 | .71 |
| Number of Victims | 1.2252[a] | 3.40 |
| Number of Offenders | .6495[a] | 1.91 |
| Victim-Offender Relationship | .0422 | 1.04 |
| Number of Mitigating Circumstances | −1.0734[a] | .34 |
| Race of Offender | 1.3160 | 3.73 |
| Race of Victim | −1.2911 | .27 |
| Type of Weapon | −.0069 | .99 |
| Total Number of Statutory Aggravating Circumstances | .8645[a] | 2.37 |
| Number of Felony Offenses in Addition to Murder | .7019[a] | 2.02 |
| Number of Non-Statutory Aggravating Factors | .9595[a] | 2.61 |
| Constant | −2.3180 | |
| Model Classification: Percent correctly classified by model: | | 82.96% |
| Percent correctly classified by chance: | | 69.63% |
| Proportion reduction in error relative to chance: | | 44.99% |

Table 16B: Maximum Likelihood Logit Estimate for the Decision to Impose a Death Sentence in South Carolina

| | ML Estimate | Odds Multiplier[b] |
|---|---|---|
| Number of Victims | 1.1908[a] | 3.29 |
| Number of Offenders | .7091[a] | 2.03 |
| Number of Mitigating Circumstances | −1.2015[a] | .30 |
| Race of Victim | −1.3598[a] | .26 |
| Race of Offender | 1.3150[a] | 3.72 |
| Total Number of Statutory Aggravating Circumstances | .8893[a] | 2.43 |
| Number of Felony Offenses in Addition to Murder | .6936[a] | 2.00 |
| Number of Non-Statutory Aggravating Factors | 1.6314[a] | 2.80 |
| Constant | −2.4643 | |
| Model Classification: Percent correctly classified by the model: | | 82.96% |
| Percent correctly classified by chance: | | 68.15% |
| Proportion reduction in error relative to chance: | | 47.61% |

[a] $p < .10$.
[b] *See supra* note b at Table 5.

These include the total number of statutory aggravating circumstances, the number of non-statutory felonies committed, and the existence of non-statutory aggravating factors. The prominence of the first and third of these factors is particularly interesting.

The logit analysis indicates that homicide defendants whose crime included a non-statutory aggravating factor were almost three times more likely to be sentenced to death than were other defendants. Although the existence of a non-statutory factor was highly determinative of the decision to impose a death sentence, a reading of the South Carolina statute suggests that only *statutory* aggravating circumstances are to be submitted to and considered by the jury.[189] The state supreme court seemed to adopt this position in *Shaw* when it observed that the statute "makes no provision for the consideration . . . of any non-statutory aggravating circumstances."[190] This statement is inconsistent with the court's approval in *Shaw* and other cases of consideration of a non-statutory aggravating circumstance as relevant to the circumstance of the crime or the character of the offender.[191] This inconsistency suggests that sentencers also operated with a "threshold" understanding of aggravating circumstances—once the State has met its requirement of one aggravating circumstance the sentencer is free to consider (and does consider and is heavily influenced by) other aggravating circumstances.

The logit analysis also shows that defendants charged with more than one statutory aggravating circumstance were almost two and one-half times more likely to be sentenced to death than were those committing only one. This statistic suggests that in some cases sentencers made a meaningful distinction between a defendant who, for instance, raped and murdered his

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189. Hubbard, Burry & Widener, *supra* note 143, at 417-19.

190. State v. Shaw, 273 S.C. 194, 201, 255 S.E.2d 799, 802, *cert. denied*, 444 U.S. 957 (1979).

191. *Id.*; State v. Gilbert, 273 S.C. 690, 283 S.E.2d 179 (1981), *cert. denied*, 456 U.S. 984 (1982); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), *cert. denied*, 463 U.S. 1229 (1983); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979); *see also supra* note 181 and accompanying text. As noted before, however, the Supreme Court settled this issue in Zant v. Stephens, 462 U.S. 862 (1983), and Barclay v. Florida, 463 U.S. 939 (1983), holding that excluding non-statutory aggravating factors from the consideration of the jury would inhibit the principle of individualization of death sentences espoused in Woodson v. North Carolina, 428 U.S. 280 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978). *See supra* note 6 and accompanying text.

victim, and one who first kidnapped her and conducted the rape at another location. In other cases, however, multiple aggravating circumstances may exist when the prosecutor charges, and the jury finds, several aggravating circumstances stemming from a single behavioral act. Under the state's death penalty act, three separate aggravating circumstances are robbery with a deadly weapon, larceny with a deadly weapon, and murder for pecuniary gain.[192] A single offense of armed robbery can be, and has been, charged as one or more overlapping but separate aggravating offenses.[193] In addition the statute lists burglary and housebreaking as distinct aggravating circumstances, and these two could overlap with robbery and larceny.[194] As previously discussed, the prosecutors' decisions to seek the death penalty were affected by the number of aggravating factors charged. These data show that sentencers may have placed greater weight on the number of aggravating circumstances presented to them, even if they followed from a single act. Moreover, when the state supreme court examined the issue of overlapping circumstances, it did not appear to be critical of the practice.[195]

Important differences also separate the factors that influenced the prosecutors' decisions to seek a death sentence from those that influenced sentencers' decisions to impose one. In determining the appropriateness of the death penalty, sentencers, like prosecutors, were influenced by the number of victims and offenders. Defendants who killed more than one victim were over three times more likely to receive a death sentence than were those who killed a single victim. Those who killed with the assistance of another were almost twice as likely to be sentenced to death as were defendants who killed alone. Although the prosecutors' decisions to seek a death sentence were not influenced by the presence of mitigating circumstances, sentencers, true to their *Lockett* expectations, were influenced. Defendants who showed some extraordinary factor in mitigation were only

192. S.C. CODE ANN. § 16-3-20 (C)(a) (Law. Co-op. Supp. 1987).

193. State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981), *cert. denied*, 463 U.S. 1229 (1983); State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179 (1981), *cert. denied*, 456 U.S. 984 (1982).

194. For additional discussion of overlapping aggravating circumstances in the South Carolina statute, see Hubbard, Burry & Widener, *supra* note 143, at 420-23.

195. 276 S.C. 258, 277 S.E.2d 696; 277 S.C. 53, 283 S.E.2d 179; *see also* Hubbard, Burry & Widener *supra* note 143.

one-third as likely to be sentenced to death as were those defendants lacking such a mitigating circumstance.[196]

Race also affected sentencers' decisions differently than it affected prosecutors' decisions. Consistent with the preliminary results reported in Table 15, the logit analysis conducted for race in Table 16 suggests that, although the victim's race influenced sentencing, its effect was opposite in sign to that found for prosecutors' decisions to seek a death sentence. Killers of whites were about one-third as likely to receive a death sentence as were killers of blacks, even after several aggravating and mitigating factors are controlled. The data also suggest that white offenders were about four times more likely than black offenders to be sentenced to death.

The implications of these reported racial effects are unclear for two reasons. First, the number of death sentences imposed during 1977-1981 are too few to separate reliably the real racial effects from spurious variation due to limited sample size.[197] Second, as noted earlier, the racial effects observed at sentencing may be the product of sample selection bias—the selective filtering of cases at earlier stages.[198]

This empirical analysis of the administration of capital punishment in South Carolina during its first four years, however, indicates clearly that one central and early decision making point in the process—the decision of the local prosecutor to seek a death sentence—was influenced by the race of the victim and offender. Apparently the procedural revision of South Carolina's death penalty statute has not been successful in ridding racial discrimination from at least one critical point in the capital sentencing process. If the legislature intended promulgation of statutory aggravating and mitigating circumstances to limit the discretion of sentencers directly and prosecutors indirectly,[199] the evidence reported here casts serious doubt on the success of the latter, and at least questions the efficacy of the former. The following section empirically reviews the extent to which other procedural changes in the 1977 Act have rid the system of the second element of *Furman*'s infirmity—arbitrariness.

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196. *See supra* note 187.
197. See text accompanying *supra* note 185; *see also supra* note 51.
198. *See supra* notes 51, 186 and accompanying text.
199. *See supra* note 18 and accompanying text.

## V. CAPITAL SENTENCING AND ARBITRARINESS IN SOUTH CAROLINA

### *A. Introduction*

The issue of nonarbitrary capital sentencing entails the second element of evenhanded justice—the principle of comparability—which posits that capital homicides of comparable aggravation should be punished with comparable severity.[200] Even if free from the taint of racial influences, then, a death sentence could still be found invalid under *Furman*'s proclamation of evenhanded capital justice if similarly culpable defendants who committed similarly aggravated acts were *generally* given different punishments.[201]

The above statement contains several ambiguities. For instance, what is a "similarly culpable" defendant or a "similarly aggravated" act, and how often should a penalty be inflicted

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200. For a philosophical justification from a Kantian retributionist position, see Radin, *Proportionality, Subjectivity, and Tragedy*, 18 U.C. DAVIS L. REV. 1165 (1985).

201. An arbitrary death sentence in violation of *Furman* occurs when the usual penalty for a given type of capital crime is less than death. This should be distinguished from an occasional granting of mercy when the usual penalty for a group of equally culpable offenders is death. The isolated grant of mercy does not offend the Constitution. Only rigorous, extensive proportionality review can differentiate between the isolated grant of mercy and the isolated infliction of the death penalty:

> Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

Gregg v. Georgia, 428 U.S. 153, 203 (1976).

In McCleskey v. Kemp, ___ U.S. ___, 107 S. Ct. 1756 (1987), a majority of the Court suggested a different position, that even the arbitrary granting of mercy is not offensive to the Constitution as long as individualized procedures are followed:

> McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty. . . .
>
> Because McCleskey's sentence was imposed under Georgia sentencing procedures that focus discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," . . . we lawfully may presume that McCleskey's death sentence was not "wantonly and freakishly imposed . . . ."

*Id.* at 1774 (quoting *Gregg*, 428 U.S. at 206).

The majority in *McCleskey* here referred to Georgia's statutory safeguards to reject McCleskey's claim of disproportionate impact even though it is the very effectiveness of these procedures that was challenged.

before it can be said to be "generally" applied? Evenhandedness unambiguously requires, however, that similarly situated defendants be treated similarly, and with a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[202]

This principle of comparability suggests that a death sentence may violate the eighth amendment if it is applied in an inconsistent fashion compared with other cases: the issue is one that Baldus referred to as *comparative excessiveness*.[203] Comparative excessiveness means that a death sentence may not be invalid in the traditional eighth amendment sense of being substantially disproportionate to the offense, but may nonetheless violate the eighth amendment because it is disproportionate (excessive) compared with the penalty imposed in other, factually similar cases. In the second sense of excessiveness a penalty is undeserved in a comparative retributivist meaning even if deserved in an absolute sense.[204] Death sentences for some crimes have been found unconstitutional in the traditional eighth amendment sense,[205] but the Supreme Court has found capital punishment an acceptable penalty for an aggravated murder. The Court, however, will invalidate death sentences that are excessive when compared with sentences in similar cases. For example, in *Godfrey v. Georgia*,[206] which addressed a domestic slaying, the Court reviewed sentencing trends in Georgia for domestic murders and concluded that Godfrey's death sentence was excessive and therefore invalid because it could not be dis-

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202. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring). The constitutional requirement of evenhanded, consistent sentencing in capital cases has been a recurrent theme. *See* Zant v. Stephens, 456 U.S. 410 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

203. Baldus, Pulaski & Woodworth, *supra* note 105.

204. *See* Radin, *supra* note 200.

205. In Coker v. Georgia, 433 U.S. 584 (1977), the Supreme Court invalidated capital punishment for the rape of an adult woman in which no life was taken because death was deemed a "grossly disproportionate and excessive punishment." *Id.* at 592. In Enmund v. Florida, 458 U.S. 782 (1982), the Court conducted a similar substantive analysis and concluded that a capital sentence violates the eighth amendment when imposed on a defendant who himself neither took a life nor intended to do so. The Court also conducted a substantive eighth amendment analysis of noncapital cases in Solem v. Helm, 463 U.S. 277 (1983); Hutto v. Davis, 454 U.S. 370 (1982); and Rummel v. Estelle, 445 U.S. 263 (1980).

206. 446 U.S. 420 (1980).

tinguished in any "principled way" from the many similar domestic slayings in which a death sentence was not imposed.[207]

If post-*Furman* death sentences were going to be held to the constitutional requirement established by the comparability principle of evenhandedness, a mechanism was needed by which the comparative excessiveness of sentences could be determined. As Baldus noted, comparative excessiveness in capital sentencing is different from traditional eighth amendment disproportionality in terms of the review procedures needed by each.[208] In traditional eighth amendment analysis the issue of disproportionality is a decidedly judicial determination based upon a review of cultural values, legislative practices, and prevailing public opinion. Courts at times apply local empirical indicia, such as sentencing and conviction patterns, but the standard employed is often on a national level.[209] Examination of the comparative excessiveness of individual death sentences, in contrast, requires a review of sentences in comparable cases from a more limited domain, usually the state.[210] This comparison of individual death sentences with penalties imposed in comparable cases within the same state is generally conducted by a court of statewide jurisdiction and is referred to as proportionality review. Although proportionality is not a constitutional requirement,[211] evenhanded capital sentencing is. In addition, appellate review of death sentences is statutorily mandated in many states, and

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207. *Id.* at 433.

208. Baldus, Pulaski & Woodworth, *supra* note 105.

209. See the objective indicators employed in *Enmund*, 458 U.S. 782, 788-96; *Coker*, 433 U.S. at 591-600; and *Gregg*, 428 U.S. at 176-87.

210. The Fifth Circuit, however, has approved of Louisiana's use of a restricted circuit-wide standard of capital proportionality review. Williams v. Maggio, 679 F.2d 381, 394-95 (5th Cir. 1982), *cert. denied*, 463 U.S. 1214 (1983).

211. In Pulley v. Harris, 465 U.S. 37 (1984), Justice White, writing for the majority, noted that none of the Court's earlier death penalty decisions could stand for the proposition that proportionality review was a constitutional requirement. *Id.* at 45-50. While the Court's decisions in both *Gregg* and *Proffitt* supported the view that appellate proportionality review was an important protection against the arbitrary and capricious infliction of the death penalty, neither held that it was constitutionally indispensible. *See infra* note 213. Although holding that an extensive proportionality review is not required in every case, the Court in *Pulley* suggested that some type of review may be required, at least in some cases, and that, if a capital sentencing system lacked other adequate safeguards to ensure nonarbitrary capital sentences, then proportionality review may be required. *Id.* at 51. For a detailed discussion of the implications of *Pulley*, see Winick, *supra* note 63.

the review procedures used in these states may have constitutional importance.[212]

The 1977 Act requires the automatic review of all death sentences by the state supreme court.[213] The explicit purpose of the South Carolina proportionality review is to ensure the non-capricious, evenhanded imposition of the death penalty by determining "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[214] The purpose of this provision, then, is to assess the proportionality of a given death sentence by determining if it is given generally in comparable cases in which comparability is determined by factually similar cases, considering both the crime and the defendant. If the intention and methods of South Carolina's proportionality review are conceptually clear, however, conducting such a review in practice is no easy task. No clear principles provide the criteria to be used in determining which are "similar" cases, or even the universe or pool from which to select such cases. The follow-

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212. *See* Hicks v. Oklahoma, 447 U.S. 343 (1980); Godfrey v. Georgia, 446 U.S. 420 (1980); *see also* Baldus, Pulaski & Woodworth, *supra* note 105, at 664-65.

213. The procedures to be followed by the state supreme court are spelled out in general terms in the statute. *See* S.C. CODE ANN. § 16-3-25 (Law. Co-op. 1987). The state supreme court in *Shaw* noted that the function of appellate review is to place a second check on arbitrary capital sentencing by determining whether death sentences are comparatively excessive: "As an additional check against the random imposition of the death penalty, this Court is directed to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." State v. Shaw, 273 S.C. 194, 211, 255 S.E.2d 797, 802, *cert. denied*, 444 U.S. 957 (1979). The court did not discuss the specific methodology of its review for comparatively excessive sentences, but it appeared to include a comparative review of comparable cases. Such a review seems to be required by the statute. *See* S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1987).

The language of the South Carolina statute that discusses appellate review of death sentences is virtually identical to the language in the Georgia statute approved in *Gregg*. The *Gregg* court noted with approval the role that such comparative review by a court with statewide jurisdiction would play in reducing the arbitrariness condemned in *Furman*: "Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." 428 U.S. at 195. The court also stated that "the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." *Id.* at 198. For an excellent review of the role of appellate review in reducing the arbitrariness of death sentences, see Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786 (1983).

214. S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1987).

ing section briefly reviews several methods for conducting a proportionality review of death sentences. Two methods offer the most reliable approach to identifying comparatively excessive death sentences and will be used in an empirical analysis of the twenty-six death sentences imposed in South Carolina during the study period. After describing the procedures and how they can be used, the next section will review the theory and methods of proportionality review actually employed by the South Carolina Supreme Court. It will suggest why the theory of proportionality review used by the court is flawed and how its methodology may be far less reliable in determining which death sentences are comparatively excessive than the more extensive empirical approaches illustrated here.

### *B. Conducting a Search for Comparatively Excessive Death Sentences: An Empirical Approach*

Several different approaches can be employed to determine whether a death sentence is comparatively excessive. Baldus suggested three methods: the "reasonableness" approach, the "precedent seeking" approach, and the "frequency" approach.[215] In the reasonableness approach the reviewing court makes a subjective assessment of the egregiousness of the particular killing, weighing both aggravating and mitigating circumstances, and then subjectively determines whether a death sentence is a reasonable penalty. The court does not make a direct comparison or reference to other cases and the sentences imposed. Rather, the court uses its own values and notions about deserved punishment and reasonable retribution in determining whether a death sentence is appropriate. An excessive death sentence is one which transcends the egregious nature of a particular killing in the eyes of the court. Clearly, the reasonableness approach is not a truly comparative proportionality review because the court does not make a direct comparison with the penalty imposed in comparable cases. In many ways it is similar to the traditional form of eighth amendment proportionality review by which the court relies on judicial values and experiences in determining whether an offense in general deserves the death penalty. In

215. Baldus, Pulaski & Woodworth, *supra* note 105, at 668-70.

*State v. Hyman*[216] the South Carolina Supreme Court followed the reasonableness approach. The court affirmed the defendant's death sentence with the following "review": "The record clearly reflects appellant planned, prepared and committed a brutal crime for the purpose of obtaining money. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case."[217]

The precedent seeking approach is a variation of the reasonableness approach: the court subjectively weighs the aggravating and mitigating features of an offense in determining the wrongfulness of the offense. The court then makes an overall determination of the egregiousness of the crime or identifies specific aggravating features about the offense which justify a death sentence. It may also discuss mitigating circumstances, but these are usually introduced solely to discuss how they fail to outweigh the impact of the aggravating factors. In contrast to the reasonableness approach, the reviewing court then identifies one or more previously affirmed cases that it has found comparable. If the court decides to affirm the case being reviewed, it selects, and cites as comparable, previously affirmed death sentences. If, however, it decides to remand for resentencing, comparable cases that resulted in a life sentence will be selectively cited.

The South Carolina Supreme Court used the precedent seeking approach in *State v. Yates*.[218] The court affirmed the death sentence of a defendant who wounded one victim and whose co-perpetrator killed another. The court noted that the defendant deserved a death sentence and, further, that the imposition of a death sentence was acceptable because a death sentence was imposed in another "comparable" armed robbery homicide:

> We are satisfied that the penalty here imposed is neither excessive nor disproportionate in light of this crime and this defendant. Given that we have upheld a comparable sentence in the comparable case of *State v. Gilbert* . . . we are confident that the finding of this jury represents consistent application of the ultimate sanction in this category of capital crime.[219]

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216. 276 S.C. 559, 281 S.E.2d 209 (1981), *cert. denied*, 458 U.S. 1122 (1982).
217. *Id.* at 571, 281 S.E.2d at 215.
218. 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1124 (1983).
219. *Id.* at 45, 310 S.E.2d at 815.

The frequency approach to comparative excessiveness is fundamentally different from both the reasonableness and precedent seeking approaches because it mandates a true comparative review of similar cases. As described by Baldus,[220] the frequency approach entails three stages. In the first stage the reviewing court determines which elements, or combination of elements, in the case warranted a death sentence. These factors determine which other cases will be selected as similar. In the second stage the court determines the relevant pool of cases from which the sub-pool of similar cases will be drawn and selects the similar cases using the relevant factors identified in the previous stages. Finally, the court estimates how many death sentences are being imposed in the smaller pool of similar cases and determines whether it is being applied with sufficient frequency to warrant upholding the sentence in the case under review. Stated otherwise, the court determines the frequency of life sentences within a group of cases comparable to the case under review to determine if these life sentences reflect the isolated grant of mercy or if the imposed death sentence is excessive. The South Carolina Supreme Court has not used the frequency approach to comparative sentence review.

Although each of these approaches represents a different method of conducting proportionality review, the frequency approach is arguably best able to identify comparatively excessive death sentences. As previously discussed, the purpose of identifying comparatively excessive death sentences is to determine if the imposition of a life sentence in a pool of comparable capital cases reflects a constitutionally permissible isolated grant of mercy or if a death sentence is so infrequently applied as to constitute "the pointless and needless extinction of life."[221] By defi-

220. For a more detailed discussion of the frequency approach, see Baldus, Pulaski & Woodworth, *supra* note 105, at 669-70.

221. Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring). Justice White suggested that death sentences must be applied with sufficient regularity to further the only two legitimate state interests in punishment: deterrence and retribution. *Id.* at 311-13. An important eighth amendment interest is served by an exhaustive comparative review. Since the permissible range of retribution for offenses is not fixed, but rather is determined in light of contemporary community standards, "[i]t is now well established that the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.' " Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). An important mechanism by which the court can discover such commu-

nition, pursuing this goal requires the reviewing court to conduct some kind of external empirical review by comparing the frequency of life and death sentences among those cases similar to the death case reviewed. Unlike traditional eighth amendment analysis,[222] the entire thrust of a comparative excessiveness review is that, although a death sentence may be somehow deserved in a traditional eighth amendment sense, a penalty may contravene the evenhandedness principle because comparably situated defendants generally are given a less severe penalty.[223]

These differences in the approach are especially significant because a central infirmity of capital sentencing identified by the *Furman* Court was that sentencing *patterns* suggested there was "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[224] The impropriety, then, is not with the deservedness of an individual sentence, but is with the deservedness of the penalty in one case compared with that found in comparable cases.[225] The superiority of the frequency approach for constitutional questions of comparative excessiveness was also referred to by the plurality opinion in *Gregg*:

> [P]roportionality review substantially eliminates the possibility

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nity mores is by comparing the punishment received by similarly circumstanced offenders. Vigorous comparative review then, is the means by which the reviewing court can keep in touch with the changing conscience of the community and is instrumental in determining the proportionality of a given sentence in both its traditional eighth amendment sense and in the comparative sense. *See* Goodpaster, *supra* note 213, at 796-98. The procedures used to determine proportionality in its traditional and comparative sense may be similar. *See* text accompanying *infra* notes 225 and 316.

222. *See* Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977).

223. For a more detailed philosophical discussion of the difference between absolute and comparative retribution, and the moral ascendancy of the latter, see Radin, *supra* note 200.

224. 408 U.S. 238, 313 (1972) (White, J., concurring).

225. In conducting its own traditional proportionality review and comparative sentence review the Supreme Court has adopted the frequency approach. In both *Coker*, 433 U.S. 584, and *Enmund*, 458 U.S. 782, the Court surveyed sentences imposed for similar crimes and concluded that community conceptions of decency did not tolerate death as a penalty for the rape of an adult woman or for one who neither committed nor intended to commit murder. In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court was critical of the Georgia Supreme Court's failure to conduct a rigorous comparative sentence review. *Id.* at 431-33. Although Godfrey's offense (homicide) did not invalidate his death sentence, the practice of Georgia juries of not generally imposing a death sentence for a domestic slaying did invalidate it.

> that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.[226]

Only the frequency approach to comparative review can determine reliably "when juries generally do not impose the death sentence in a certain kind of murder case."[227]

The language of South Carolina's capital punishment statute specifies that some type of proportionality review must be undertaken, but provides no clear guidance for how that review should be conducted. It states that the state supreme court shall review each death sentence for: (a) arbitrariness or racial discrimination, (b) factual errors in finding an aggravating circumstance, and (c) disproportionality in penalty *in comparison with similar cases*.[228] In addition, the statute requires the court to include in its decision those other, comparable cases it considered in conducting the review.[229] Given that the infirmity identified in *Furman* was *comparative* excessiveness, the United States Supreme Court's understanding of the role of appellate review under the "constitutionally indistinguishable"[230] Georgia statute, and the references to comparative case review in the South Carolina statute, the South Carolina Supreme Court should adopt some form of frequency-based proportionality review to fulfill its statutory duty. A subsequent section will show that the state supreme court has not adopted either a frequency approach or any method of genuine comparative sentence review. It will also discuss the theory of proportionality review which the South Carolina Supreme Court has adopted. The next section, however, will illustrate with an empirical analysis of South Carolina sentenc-

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226. 428 U.S. at 206.

227. *Id.*

228. S.C. CODE ANN. § 16-3-25(C) (Law. Co-op. 1987) The court's review of capital cases is not restricted to those errors preserved by the appellant, but rather is conducted *in favorem vitae*. Although the practice of reviewing death cases *in favorem vitae* was adopted to ensure capital defendants complete review, it is not without its own difficulties, particularly since the state courts' decisions have not provided sufficient analysis. *See* Hubbard, Burry & Widener, *supra* note 143, at 438-45, 463-65.

229. S.C. CODE ANN. § 16-3-25(E) (Law. Co-op. 1987).

230. State v. Shaw, 273 S.C. 194, 203, 255 S.E.2d 799, 804, *cert. denied*, 444 U.S. 957 (1979).

ing data what a true frequency-based approach to comparative review can reveal.

### C. *Comparative Capital Sentence Review in South Carolina: Methodological Issues*

Having established that a frequency approach is the best method for determining which death sentences are comparatively excessive, this Article will now address difficult methodological issues that have no easy solution. As discussed earlier, the frequency approach requires the identification of a pool or universe of cases from which to select a smaller group of cases comparable to the death case being reviewed. Once this universe of cases has been defined, the next step is to specify the criteria for determining which cases are indeed similar to the case under review. The South Carolina statute provides neither guidance in selecting an appropriate or acceptable minimum universe of cases, nor a basis upon which to select similar cases. The chosen method should facilitate the identification of comparatively excessive death sentences.

The first issue in the selection process is the restriction of the universe of cases in the comparative review. Should the universe include, for instance, all homicide cases, both capital and noncapital, whether or not they resulted in a conviction? Or should the universe be very restricted to include only appealed death sentences that have been affirmed? The former is unnecessarily broad, while the latter is too narrow to identify reliably the comparatively excessive death sentences. Obviously, not all homicides need to be included in the initial pool of cases; most are not eligible for death penalty consideration because they do not include an aggravating circumstance. The important threshold function of an aggravating circumstance in death penalty legal doctrine alone makes most homicides dissimilar.[230] At a minimum, then, the universe of cases should include those homicides that are accompanied by an aggravating circumstance and that are, therefore, death eligible. The universe of cases also should include only those that resulted in a homicide conviction, either by trial or guilty plea.

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230. *See supra* note 6 and accompanying text.

It could be argued that this universe should be further restricted to include only those cases in which the trier of fact affirmatively found an aggravating circumstance. This would exclude cases in which an aggravating circumstance, though present, was not charged by the prosecutor; cases in which aggravating circumstances were initially charged but were not brought to trial because of a plea bargain; and cases in which the defendant was found guilty of a lesser included offense.

Such a restriction of the universe of cases is not employed here for one important reason. This research and that of others[231] have shown consistently that the prosecutors' charging decisions have been, at least in part, arbitrary and influenced by the racial characteristics of the offender and victim. Radelet and Pierce found that in their charging decisions Florida prosecutors frequently upgraded and downgraded homicides, making them appear either more or less serious than the description of the offense in the police report.[232] This Article and Hubbard's article[233] suggest that South Carolina prosecutors engaged in charge "stacking" or "reduction," by charging none or several aggravating circumstances stemming from one behavioral act. Given the workings of prosecutorial discretion in death cases, then, homicide cases that resulted in a conviction and which included a statutory aggravating circumstance comprise an appropriately restrictive universe of cases for comparative review.[234]

The universe of comparable cases also should not be restricted to only cases in which a death sentence actually was imposed or to only appealed life cases. The practical implication of such a restriction is that only death sentences are included in the universe of potentially comparable cases since most life sentences are not appealed. As Baldus noted, however, such an approach defines out of existence a true review for comparative excessiveness. If the pool contained only cases that resulted in a death sentence, however similar the cases may be, then determining the frequency of life sentences for other, equally compa-

231. *See* Baldus, Woodworth & Pulaski, *supra* note 85; Bowers, *supra* note 84; Paternoster, *supra* note 85; Radelet & Pierce, *supra* note 84.

232. Radelet & Pierce, *supra* note 84, at 599-601.

233. *See* Hubbard, Burry & Widener, *supra* note 143, at 453-56.

234. The determination of the existence of an aggravating circumstance is based upon data in the police investigation and booking report, trial transcripts, notifications of the intention to seek the death penalty, and indictment information.

rable crimes would be impossible.[235] Baldus correctly noted that this form of comparative review is a mere precedent seeking approach with less opportunity for identifying comparatively excessive death sentences. In this study the universe of cases includes homicides that were accompanied by a statutory aggravating felony and in which the defendant was convicted and sentenced to death or life imprisonment.[236]

Once the appropriate universe of cases is determined, it is necessary to establish a method for choosing cases comparable to the one under review. Again, the South Carolina statute is silent, stating only that cases should be judged similar "considering both the crime and the defendant."[237] Although this suggests that cases selected as comparable should be factually similar to the one being reviewed, two cases can be factually comparable in several ways. They may be similar in terms of *specific features* (*e.g.*, in both, two victims were killed with a gun during an armed robbery at night) or in terms of the *overall level of aggravation* (*i.e.*, even though they are factually different, they are equally egregious). This Article adheres to the approach followed by Baldus in his analysis of comparative sentence review in Georgia.[238] In the first of his papers he suggested three approaches to the determination of case comparability: the salient features method, the main determinants method, and the index or overall culpability method. The first approach is the more subjective, and the latter two are more empirical.

The salient features method classifies cases according to the extent to which they share with the reviewed case factors that seem to be important determinants of the death sentence. This process usually begins by selecting all cases that have the same aggravating circumstances as the one being reviewed, then selecting from this group cases that share other relevant fea-

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235. Baldus, Pulaski & Woodworth, *supra* note 105, at 670.

236. NATIONAL CENTER FOR STATE COURTS, PROJECT ON COMPARATIVE PROPORTIONALITY REVIEW IN DEATH SENTENCE CASES (1982-1984) recommended that a proportionality review system contain, at a minimum, all cases which resulted in a homicide conviction (by trial or by guilty plea) and which resulted in a death-eligible charge. The task force recommended a broad universe of cases because any capital sentencing process is a system that includes many decisions, and the system as a whole, rather than one or two decision points, should be subject to review.

237. S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1987).

238. Baldus, Pulaski & Woodworth, *supra* note 105; Baldus, Woodworth & Pulaski, *supra* note 85.

tures.[239] For example, in the South Carolina murder case against the defendants Larry Gilbert and J.D. Gleaton, two brothers robbed, shot, and stabbed a lone filling station operator. Both defendants were sentenced to death. Under the salient features method, a case would be similar to this if it were a murder-armed robbery committed against a lone victim by two or more offenders who shot and stabbed their victim.

This example highlights two difficulties with the salient features method of comparative review. First, identification of the features in a homicide that were instrumental in the imposition of the death penalty is a subjective assessment. One cannot know, for instance, if the features described above brought Gilbert and Gleaton their death sentences, or if the jury deemed other elements salient. Second, to select the most similar cases, it is desirable to identify and pair as many salient factors as possible. Unfortunately, as the number of salient features increases, the number of similar cases declines, particularly if the universe of cases is small.

The main determinants method is a more empirical method for determining the similarity of cases. First, empirical identification is made of the case factors that are the most important determinants of the death sentence.[240] This is done through multiple regression analysis (logit regression) with case characteristics (aggravating and mitigating factors) as explanatory factors and the sentencing decision as the outcome variable. The regression analysis identifies the explanatory factors that are most statistically influential in the sentencing decision. When this is accomplished, the second step is to classify each case in the universe according to whether it included each of the influential factors. For example, if the regression analysis indicated that four factors were influential in determining who is sentenced to death (number of victims, number of offenders, victim and offender relationship, and number of statutory aggravating circumstances), each case would be given a score from 0 (indicating that this case had none of these four factors) to 5 (indicating

239. The phrase "relevant features" underscores that the factors used to classify cases should have a meaningful or rational basis. In Godfrey v. Georgia, 446 U.S. 420, 433 n.16 (1980), the Court observed that a gruesome crime scene was not a rational basis upon which to differentiate a life and death sentence.

240. Baldus, Pulaski & Woodworth, *supra* note 105, at 684-89.

that this case contained all four factors). The universe of cases then is divided into five groups depending on the number of factors (main determinants) found in each case; these are subgroups of similar cases. The death sentencing frequency is estimated for each subgroup of similar cases. Finally, each death case is scored according to the number of main determinants, and the death sentencing rate within the subgroup of similar cases is calculated.

An advantage of the main determinants method over the salient features method is that the latter requires a subjective assessment of which factors in a case were most salient. The main determinants method determines these factors empirically for the universe of cases as a whole. A disadvantage of the main determinants method is that it does not estimate which factors were important in determining any *particular* death sentence, but which factors *on average* were influential. Furthermore, since any score on the main determinants may be variously determined, the subgroups will be more diverse in terms of specific case features than those discovered through the salient features method. Finally, similar to the salient features method, as the number of main determinants increases, finding a sufficient number of cases matched on all factors is difficult.

The index or overall culpability method differs from the previous two approaches because similarity is determined not on the basis of specific case characteristics, but on a single factor—the overall level of aggravation. This aggravation level is the overall probability that the defendant would receive a death sentence, and, like the main determinants method, is estimated with multiple regression (logit) techniques. Unlike the main determinants approach, which simply counts the number of factors present in a case, the index method uses the results of the regression procedure to weight each factor according to its relative importance (the logit coefficient). The sum of the weights equals the defendant's index score, and cases are comparable if their index scores are close.

An advantage of the index method is that, in determining the overall culpability of a defendant, it can differentially weight factors that vary in importance. This method also uses a large number of explanatory factors in determining comparable cases, because each factor is summed to form a single composite index. Finally, both the United States Supreme Court and the South

Carolina Supreme Court have used this approach, determining case similarity in terms of the overall degree of defendant culpability.[241] A disadvantage of this procedure, of course, is that cases may have equivalent overall culpability scores, but vastly different fact patterns.

Rather than relying upon the results of one method for determining case similarity, this analysis uses all three methods to examine the issue of comparatively excessive death sentences in South Carolina. For each method the universe of similar cases will consist of the 135 cases in which murder and a statutory aggravating felony were committed; the defendant was convicted of murder or nonnegligent manslaughter; and a death sentence could have been imposed, even if one was not actually sought. In addition, in the selection of comparable cases for each sentence being reviewed, the cases in which a defendant was sentenced after the date on which the case being reviewed was affirmed were excluded from the selection of comparable cases.

### *D. Comparative Capital Sentence Review in South Carolina: Empirical Results*

Of the 135 convicted defendants in the universe of cases, twenty-six (19%) initially were sentenced to death. The state supreme court reviewed for comparative excessiveness and affirmed nineteen of the twenty-six death sentences imposed during the study period. Several of these nineteen affirmed death sentences were imposed on codefendants, and fifteen cases include characteristics reported in Table 17A.[242] In reviewing the

241. *Id.* at 681-82 n.86; In *Gaskins*, *Chaffee*, and *Adams* the court noted, "The facts are not the same in any two cases and, accordingly, our review of the facts relate largely to degree of culpability of the defendant and the viciousness of the killing." State v. Gaskins, 284 S.C. 105, 130, 326 S.E.2d 132, 146-47, *cert. denied*, 471 U.S. 1120 (1985); State v. Chaffee, 285 S.C. 21, 35-36, 328 S.E.2d 464, 472 (1984), *cert. denied*, 471 U.S. 1109 (1985); State v. Adams, 279 S.C. 228, 241, 306 S.E.2d 208, 215, *cert. denied*, 464 U.S. 1023 (1983).

242. In Case fifteen the defendant's death sentence originally was upheld in State v. Thompson, 278 S.C. 1, 292 S.E.2d 581, *cert. denied*, 456 U.S. 938 (1982), but was later vacated on post-conviction relief in Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984). On remand the defendant was sentenced to life. Because the death sentence was first affirmed, and later vacated on procedural grounds, rather than because it was disproportionate, it is included in the subgroup of affirmed death sentence cases. In State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979), a defendant was sentenced to death but the sentence was vacated for resentence on remand. He was resentenced to death, but died

characteristics of affirmed death cases one is immediately struck by their diversity. All of the cases except case number eleven were armed robberies and rapes or incidents of criminal sexual conduct, or both, and about one-half of them included more than one statutory aggravating felony. Six of the twenty-six death sentences imposed during this period in six separate cases have been vacated, all on procedural grounds. The case characteristics of the six vacated death sentences are reported in Table 17B. This section of the Article attempts to discern if the death sentences described in Table 17A, which have been affirmed and found to be nonexcessive by the supreme court are, in fact, proportionate to "the penalty imposed in similar cases, considering both the crime and the defendant."[243]

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in prison before his appeal was decided.

243. S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1987).

Table 17A: Characteristics of the Fifteen Cases Where a Sentence of Death Was Imposed and Affirmed in South Carolina During 1977-1981[a]

| | Salient Characteristics |
|---|---|
| Case #1 | Murder; Armed Robbery; Rape; Kidnapping; Multiple Victims; Multiple Offenders; Young Victims; Post-Mortem Abuse (State v. Shaw, 273 S.C. 194, 255 S.E.2d 779, *cert. denied*, 444 U.S. 957 (1979)). |
| Case #2 | Murder; Armed Robbery; Multiple Offenders; Single Victim; Victim Shot and Stabbed (State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179 (1981), *cert. denied*, 456 U.S. 984 (1982)). |
| Case #3 | Murder; Armed Robbery; Multiple Offenders; Single Victim Killed, Second Victim Injured; Elderly Victim (State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), *cert. denied*, 458 U.S. 1122 (1982)). |
| Case #4 | Murder; Rape; Young Victim; Abduction of Victim; Brutal Beating (State v. Butler, 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982)). |
| Case #5 | Murder; Armed Robbery; Kidnapping; Multiple Victims; Multiple Offender; Multiple Offenses (State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 460 U.S. 1103 (1983)). |
| Case #6 | Murder; Criminal Sexual Conduct; Assault and Battery with Intent to Kill; Kidnapping; Multiple Offenders; Multiple Victims (State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied*, 463 U.S. 1229 (1983)). |
| Case #7 | Murder; Armed Robbery; Assault and Battery with Intent to Kill; Multiple Offenders; One Victim Killed, a Second Victim Injured; Defendant Did Not Kill Victim (State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1124 (1983)). |
| Case #8 | Murder; Kidnapping; Housebreaking; Defendant Tried to Hide Victim's Body; Single Victim (State v. Adams, 279 S.C. 228, 306 S.E.2d 208, *cert. denied*, 464 U.S. 1023 (1983)). |
| Case #9 | Murder; Burglary; Robbery; Criminal Sexual Conduct; Elderly Victim (State v. Spann, 279 S.C. 399, 308 S.E.2d 518 (1983), *cert. denied and appeal dismissed*, 466 U.S. 947 (1984)). |
| Case #10 | Murder; Kidnapping; Criminal Sexual Conduct; Victim Brutally Killed by Beating and Stabbing (State v. Plath, 281 S.C. 1, 313 S.E.2d 619, *cert. denied*, 468 U.S. 1226 (1984)). |
| Case #11 | Murder; Kidnapping, Single Victim; Single Offender (State v. Koon, 285 S.C. 1, 328 S.E.2d 625, *cert. denied*, 471 U.S. 1036 (1985)). |
| Case #12 | Murder; Armed Robbery; Multiple Offenders; Single Victim (State v. Patterson, 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied*, 471 U.S. 1036 (1985)). |
| Case #13 | Murder; Kidnapping; Criminal Sexual Conduct; Young Victim (State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984), *cert. denied*, 471 U.S. 1009 (1985)). |
| Case #14 | Murder; Burglary; Criminal Sexual Conduct; Post-Mortem Abuse |

(State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985), *vacated*, 476 U.S. 1101 (1986)).

Case #15[b] Murder; Armed Robbery; Multiple Offenders; Single Victim (State v. Thompson, 278 S.C. 1, 292 S.E.2d 581, *cert. denied*, 456 U.S. 938 (1982).

[a] Those cases that involve multiple offenders are listed only once even though more than one death sentence may have been handed down. In several of these cases the initial conviction was affirmed but the court vacated the sentence. Upon a second penalty hearing each of these were resentenced to death, which was affirmed on the second review. If a death sentence was first vacated and the defendant was resentenced to life his case would appear in Table 17B. All death sentences imposed during the period 1977-1981 have either been affirmed or resulted in a resentence.

[b] In this case the defendant was sentenced to death and had his death sentence affirmed by the South Carolina Supreme Court. It later vacated the death sentence on post-conviction relief, and on remand the defendant was sentenced to life. Since the original sentence was first affirmed it is included in this table.

Table 17B: Characteristics of the Six Cases, Where a Sentence of Death Was Imposed in South Carolina During 1977-1981 but Later Vacated by State Supreme Court Review

| | Salient Characteristics |
|---|---|
| Case #16 | Murder; Armed Robbery; Grand Larceny of a Vehicle; Single Victim; Single Offender (State v. Gill, 273 S.C. 190, 255 S.E.2d 455 (1979)). |
| Case #17 | Murder; Grand Larceny; Single Victim; Single Offender (State v. Linder, 276 S.C. 304, 278 S.E.2d 355 (1981)). |
| Case #18 | Murder; Criminal Sexual Conduct; Single Victim; Single Offender; Victim Killed by Stabbing and Brutal Beating (State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982)). |
| Case #19 | Murder; Larceny with Deadly Weapon; Multiple Victims; Single Offender (State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979)). |
| Case #20 | Murder; Armed Robbery; Single Victim; Single Offender (State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982)). |
| Case #21 | Murder; Armed Robbery; Assault and Battery with Intent to Kill; Multiple Victims; Single Offender (State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), *cert. denied*, 460 U.S. 1088 (1983)). |

*1. Salient Features Analysis of Comparatively Excessive Death Sentences.* In the salient features method of review, cases comparable to the one being reviewed are selected according to shared features considered important in the imposition of the death sentence. Cases are similar if they match the reviewed

case on these salient characteristics. One difficulty with this method is that, because South Carolina courts are not required to state their reasons for imposing a death sentence, the characteristics selected as salient are not necessarily those that actually were determinative. The United States Supreme Court, however, has suggested that, in distinguishing between life and death cases, a reviewing court (and sentencer) should consider rational criteria and should base its decision "on reason rather than caprice or emotion."[244] At a minimum, then, salient features should reflect those rational and meaningful characteristics of an offense that warrant a death sentence. The above quoted criteria suggest that the appearance of the crime scene is not one of those meaningful characteristics.[245]

A starting point for a salient features analysis of these fifteen affirmed death cases is to match cases according to particular aggravating circumstances. Since all of these were murders in the commission of a statutory felony, the first group of comparable cases includes those with a similar aggravating felony. If two aggravating felonies were associated with the murder, the next level matches on the second felony. If enough cases are in the universe, further refinements are made by matching cases on other relevant and rational features, such as the number of victims or age of the victim.[246] The cases in the final pool are

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244. Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

245. A South Carolina case can further illustrate this point. In discussing its theory of proportionality review in State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 460 U.S. 1103 (1983), the court referred to the previously affirmed death sentence of Horace Butler. *See* State v. Butler, 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982). In justifying the death sentence in *Copeland*, the court noted that *Butler* "involved the abduction, rape and murder of an eighteen-year-old girl as she left her place of employment after dark." 278 S.C. at 594, 300 S.E.2d at 96. In distinguishing *Butler* the court was correct in referring to the abduction and rape and probably could have considered the youth of the victim as a rational consideration; that the victim was leaving her place of employment at night is probably not what the *Godfrey* court would consider a *rational* basis.

246. Some evidence suggests that at least some South Carolina Supreme Court Justices follow a similar procedure in conducting their proportionality review. In *Copeland* Justice Gregory reviewed previous death sentences that the state supreme court had affirmed and detailed the aggravating felonies and other salient characteristics present:

> At present, South Carolina has found the death penalty to be neither excessive nor disproportionate in six distinct cases: (1) where one or more defendants rob, abduct, rape and murder one or more victims in circumstances which starkly reveal the malignant character of the defendant or defendants; (2)

matched on a number of salient elements. For example, if the death sentence being reviewed was imposed on a lone defendant convicted of murdering two victims over sixty years of age during an armed robbery, the group of comparable cases would contain armed robbery murders of multiple elderly victims by single defendants.

Table 18 reports the results of the review of the fifteen affirmed death cases identified in Table 17A using the salient features method.[247] It reports both the number of salient characteristics in the matched group of comparable cases and the frequency of death sentences within that matched group. The similarity of the comparable cases to the one being reviewed increases as the number of matched salient characteristics increases. The first two cases illustrate this point.

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where a victim, armed and defending himself, is slain by an intruding defendant who is himself armed (and possibly intoxicated) while engaged in robbing the deceased; (3) where two or more defendants, on impulse or even while intoxicated rob and murder an unarmed struggling victim in his place of business; (4) where a single defendant, alone with an unarmed and unresisting victim, robs and without mitigation whatever murders the deceased; (5) where a single defendant kidnaps, rapes and murders a victim; (6) where one or more defendants perpetrate mulitple [sic] offenses by robbing, kidnapping and murdering one or more victims in each separate incident.

278 S.C. at 595-96, 300 S.E.2d at 77; *see also*, Part V, Section E *infra* pp. 375-89.

247. Table 24, *infra* page 377, identifies by caption and citation the cases referred to in the subsequent discussion.

Table 18: Proportion of Defendants Receiving a Death Sentence Within Subgroups of Similar Cases with Salient Factors Controlled

| | Number of Salient Factors Simultaneously Controlled | | | |
|---|---|---|---|---|
| Case Number* | One | Two | Three | Four |
| Case #1 | 5/15 (.333) | 4/6 (.667) | | |
| Case #2 | 15/100 (.150) | 13/75 (.173) | 6/53 (.113) | 4/25 (.160) |
| Case #3 | 15/105 (.143) | 8/83 (.096) | 6/55 (.109) | 4/33 (.121) |
| Case #4 | 8/26 (.308) | 3/11 (.273) | 3/8 (.375) | |
| Case #5 | 15/105 (.143) | 7/22 (.318) | 5/6 (.833) | |
| Case #6 | 8/26 (.308) | 5/7 (.714) | 4/5 (.800) | |
| Case #7 | 15/105 (.143) | 8/83 (.096) | 6/55 (.109) | 6/43 (.140) |
| Case #8 | 10/17 (.588) | 2/4 (.500) | | |
| Case #9 | 8/26 (.308) | 2/11 (.154) | 2/7 (.286) | |
| Case #10 | 8/26 (.308) | 5/9 (.556) | 4/5 (.800) | |
| Case #11 | 10/17 (.588) | 5/11 (.455) | 2/6 (.333) | |
| Case #12 | 15/105 (.143) | 13/77 (.169) | 6/55 (.109) | 6/43 (.140) |
| Case #13 | 8/26 (.308) | 5/9 (.556) | 2/3 (.667) | |
| Case #14 | 8/26 (.308) | 4/12 (.333) | 2/6 (.333) | |
| Case #15 | 15/105 (.143) | 8/83 (.096) | 6/55 (.109) | 6/43 (.140) |

*See Table 17, *supra* pp. 351-52, for case names and citations.

Case One was a murder with three statutory aggravating felonies (rape, kidnapping, and armed robbery). The first salient characteristic could have been any of the three aggravating circumstances, but rape was selected because review of the data indicated that the commission of a rape-murder was strongly related to the imposition of the death penalty. In fact, with the first group of comparable cases matched on the presence of a rape, a death sentence occurred in five of fifteen cases (33%). The group of rape-murder cases was diverse, and most were less aggravated than Case One. Next, all kidnappings were matched. The proportion of these cases that resulted in a death sentence was rather high. Approximately 70% of cases that included a rape and kidnapping resulted in a death sentence. Because of this high percentage, it would be difficult to argue the death sentence in Case One was comparatively excessive.[248] Moreover, since only six of these cases were decided before Case One was

248. How frequently the death penalty should be imposed in a group of comparable cases before it becomes comparatively excessive in a particular case remains undiscussed. If, in a pool of ten comparable cases (however defined), five resulted in a life sentence and five resulted in the death penalty, can it be said that death was not generally given? Do the five life sentences reflect isolated grants of mercy or that the penalty was generally imposed for crimes of this nature? Comparatively excessive death sentences are easy to recognize at the margins. For example, if only one or two death sentences were given in a pool of ten truly comparable cases, it could be argued that they were comparatively excessive. If, however, seven or eight death sentences were issued in a pool of ten truly comparable cases then any one would probably not be disproportionate. Aside from the extremes, however, the issue is less clear.

Unfortunately, nothing in the South Carolina statute or case law indicates how infrequently the death penalty must be applied before it is considered comparatively excessive. Furthermore, United States Supreme Court decisions provide no constitutional guidance. Baldus has suggested that members of the Court have different positions regarding the tolerable amount of death sentencing infrequency: Justice Stewart condemns only the most aberrant infliction of death, while Justice White requires relatively high death sentencing rates for comparable cases to further the two acceptable goals of punishment—deterrence and retribution. Baldus, Pulaski & Woodworth, *supra* note 105, at 696-98.

An analysis of the appellate review procedures of Georgia provides assistance in addressing this issue. In Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974), the Georgia Supreme Court found a death sentence excessive because it was imposed in only 36% of the identified similar cases. The court upheld a death sentence in another case because it was imposed in 50% of the identified group of comparable cases. Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974), *vacated*, 433 U.S. 917 (1977). These cases suggest that a death sentence is comparatively excessive if it is imposed in less than 35% of comparable cases. *See also* Baldus, Pulaski & Woodworth, *supra* note 105. Although these Georgia cases at best provide only some guidance on the issue, they are a useful starting point in determining the lower limit of death sentencing frequency.

affirmed, no other salient characteristics were matched.

Case Two was a murder-armed robbery committed by two offenders against a lone victim who was shot and stabbed repeatedly. The first salient characteristic selected was the armed robbery. A total of 105 murders were committed during an armed robbery; 15 (14%) resulted in a death sentence. In murder-armed robberies with multiple offenders the estimated frequency of death sentences was 17% (13/77); for multiple offenders and a lone victim, 27% received a death sentence (3/11); and finally, multiple offenders with a lone victim who was shot and stabbed were sentenced to death in 20% of the cases (2/10). This final group of ten cases is most similar to Case Two. Contrary to findings in Case One, the frequency of a death sentence for cases comparable to Case Two is so low as to question seriously whether the sentence in Case Two is proportionate to the penalty imposed in similar cases.[249]

A procedure similar to that used for Cases One and Two was undertaken for all fifteen affirmed death cases; the results are reported in Table 18 and summarized in Table 19. The far right section of table 18 indicates that thirteen of these fifteen cases were matched according to three or more salient characteristics. In some instances the death sentence frequency in the

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249. The proportionality review undertaken by the court in this case is very similar to this analysis, but has different results. The reasons for the differences will be pursued in the next section of this Article. Justice Gregory described Case Two as follows:

> Larry Gilbert and J.D. Gleaton, brothers of whom Gleaton is the elder, robbed and murdered the operator of a filling station shortly after noon following a morning spent cruising in their automobile in search of (and possibly using) drugs. In the course of the robbery, the victim was savagely stabbed seven times as he struggled with Gleaton and was shot once by Gilbert. From the testimony, a jury could have inferred that the shot was fired while the victim lay on the floor of his business establishment.

State v. Copeland, 278 S.C. 572, 593, 300 S.E.2d 63, 75 (1982), *cert. denied*, 460 U.S. 1103 (1983). From this exerpt the salient characteristics seem to be: (a) armed robbery, (b) by two defendants, (c) against a lone victim, (d) who was "savagely stabbed" and shot. These characteristics are similar to those suggested in *Godfrey* that are "based on reason rather than caprice or emotion." Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)). That the defendants were out cruising for drugs and the disputed position of the victim seem irrelevant. Justice Gregory, however, observed—presumably because he found that it distinguished this offense—that "[a] witness testified that one of the assailants laughed at the victim in his agony," even though this testimony was "sharply contested by defendants." 278 S.C. at 593, 300 S.E.2d at 75. This comparison suggests how the court, although emphasizing salient features similar to those used in this analysis, differs in result.

pool of comparable cases is quite high. For Cases Five, Six, and Ten the rate of death sentencing in the pool of comparable cases is over 70%, and for Cases One and Thirteen the rate is 67%. These are comparatively the most aggravated of the fifteen. Case One was a rape, kidnapping, and murder that included post-mortem abuse of two teenaged victims by several offenders; Case Five was a kidnapping, armed robbery, and murder of three victims; Case Six, factually similar to Case One, was a kidnapping and criminal sexual assault of two victims—one died and the other was disfigured from a shotgun blast; Case Ten was a kidnapping, rape, and brutal killing of a lone victim by two offenders; and Case Thirteen, too, was a brutal murder of a woman following her kidnapping and rape. The death sentences imposed in these cases probably are not comparatively excessive, since capital punishment generally is imposed for crimes of this aggravation.

Table 18 also shows, however, that for an even greater number of these fifteen affirmed death cases the death sentence frequency within the pool of comparable cases was extremely low. For five (33%) of these fifteen cases (Cases Two, Three, Seven, Twelve, and Fifteen), fewer than 25% of the comparable cases resulted in a sentence of death. In each of these five cases, an armed robbery was the only statutory aggravating circumstance. One victim was killed in each, and none of the killings included brutality or savagery (see Table 17A). These killings were mildly aggravated, even simple, murder-armed robberies. The death penalty generally is not imposed for such cases in South Carolina.

Case Twelve is characteristic of these offenses. The defendant, acting with accomplices, robbed and killed a convenience store clerk. The victim was shot in the back of his head with a shotgun. The offense had no other distinctive features. Forty-three other cases were identified in which several offenders committed a murder-armed robbery against a lone victim and in which the prosecutor sought the death penalty. Of these forty-three cases, a death sentence was imposed in only six (14%). Because a life sentence is imposed in 86% of the comparable cases, the imposition of the death penalty in these five cases seems clearly to be comparatively excessive. Moreover, the analysis indicates that a death sentence is comparatively excessive in those other instances of murder-robbery in which armed robbery

is the sole statutory or non-statutory aggravating circumstance.[250]

Table 19 summarizes the results of comparative death sentence review of the fifteen affirmed cases by the salient features method. The results are both reassuring and troubling. The salient features analysis does show that some of these death sentences are not comparatively excessive. In three of these cases (in which there are a total of five defendants) the frequency of death sentences in the pool of similar cases is over 75%. The few life sentences in these cases could be isolated grants of mercy. In addition, for two other cases (in which there are three defendants) the frequency of death sentences in the group of comparable cases is approximately 70% (.714 and .667). Thus, five cases, which comprise 33% of the total of fifteen affirmed death sentence cases, are not comparatively excessive. These five cases have a total of eight defendants and comprise 40% of the twenty death sentences in these fifteen affirmed cases.

Table 19: Proportion of Death Sentences Within the Group of Comparable Cases by Salient Characteristics Method

| Probability of Death Sentence for Comparable Cases | Number of Affirmed Death Cases in This Category | Percent of Affirmed Death Cases |
|---|---|---|
| Less than .25 | 5/15 | 33% |
| .26 - .50 | 5/15 | 33% |
| .51 - .75 | 2/15 | 13% |
| .76 - 1.00 | 3/15 | 20% |

250. A brief examination of the opinion in this case is instructive. In his proportionality review, Justice Harwell, writing for a unanimous court, did not refer specifically to the armed robbery, nor did he note that it was committed by several offenders against a lone victim. He did, however, observe that "[t]he victim's autopsy revealed 30 to 40 pellet wounds to the head in addition to the one by two inch hole." State v. Patterson, 285 S.C. 5, 12, 327 S.E.2d 650, 654 (1984), *cert. denied*, 471 U.S. 1036 (1985). The court apparently used this as a basis upon which to differentiate the armed robbery-murder committed by Patterson from other armed robbery-murders.

In addition, in five of the fifteen cases (33%), the death sentence frequency in the pool of similar cases was between 26% and 50%. In one of the five cases, 50% of the comparable cases also resulted in a death sentence; in two of the five, only one in three defendants in the group of similar cases was sentenced to death; and in the two additional cases, the rate for comparable cases was slightly higher than one in three (.375) for the first and slightly lower than one in three (.286) for the second. A firm judgment of whether these five affirmed death sentences are comparatively excessive cannot be made. In the four cases in which a death sentence was applied only in approximately one of three comparable cases, however, the death penalty does not seem to have been "generally" imposed.

Table 19 shows that, in one-third of these fifteen cases (33%), the frequency of death sentences in the pool of comparable cases was less than 25%. Even this figure slightly exaggerates the regularity with which the death penalty was imposed in comparable cases. Table 18 reports that, in one of the five cases, 20% of the comparable group received a death sentence, but in the four other cases the rate of death sentences was below 15%. As Table 17A demonstrates, these five cases are all murder-armed robberies of single victims with little brutality or other aggravation.[251] Because a death sentence was imposed in only one of ten comparable cases, it appears that a death sentence was comparatively excessive for these five defendants; yet the South Carolina Supreme Court affirmed the penalty in each case.

Arguably, compilation of comparable cases for these murder-armed robbery cases is somewhat illusory. Even though a group of cases was identified and defined as similar to each one reviewed by the state supreme court, they are similar only because they share four salient characteristics (see Table 18). It may be helpful to examine one case in detail and to provide characteristics of cases found to be comparable. Case Twelve was described in an earlier section of this Article.[252] A defendant and several accomplices robbed a convenience store and killed the clerk with a shotgun blast to the back of the head. No other

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251. These five armed robberies share an interesting feature: in four of the five a white victim was killed.

252. *See supra* note 250 and accompanying text.

statutory or non-statutory aggravating circumstances were present. Forty-three other murder-armed robberies by multiple offenders of single victims were identified for which the defendant was convicted and the prosecutor sought the death penalty. Some of the cases deemed comparable to this one, but which did not result in a death sentence, included the following:

Case A:
Two male prison escapees robbed a pharmacy with a handgun. During the course of the robbery one of the two people in the pharmacy attempted to flee, but was shot in the back while running. No other aggravating features.

Case B:
Three offenders in a crime spree robbed a liquor store at gunpoint (pistol). During the course of the armed robbery one defendant shot in the head and killed the sixty-three-year-old store owner.

Case C:
Two offenders, armed with handguns, robbed a liquor store. Two victims were shot. One victim, a seventy-year-old male, was shot in the face and died instantly. The second, a female, was shot in the head, but survived.

Case D:
Three offenders entered a liquor store to rob it. The elderly owner of the store was shot in the head with a handgun and died.

Case E:
Two defendants robbed a fifty-six-year-old victim at his office. The victim was shot in the face with a handgun and died after four days in the hospital.

These cases were virtually the same factually as Case Twelve, and they comprise a representative sample of those defined as comparable. The death penalty was imposed in none of them. The only distinguishing feature between Cases A-E and Case Twelve is that in the latter the defendant used a shotgun rather than a handgun. The state supreme court may have deemed this difference and the difference in entry wounds probative.[253]

*2. Main Determinants Analysis of Comparatively Excessive*

253. *Supra* note 250.

*Death Sentences.* The findings from the salient features method were tested by conducting a comparative sentence review using main determinants to identify comparable cases. As discussed earlier, the main determinants are those factors in a case most strongly related to the decision to impose a death sentence and are identified through a multiple regression procedure. A logistic regression analysis was conducted with sentencing disposition (life or death) as the outcome variable and with the following explanatory variables: defendant's prior violent record, number of victims, number of offenders, victim and offender relationship, mitigating factors, type of weapon, number of statutory aggravating circumstances, number of non-statutory felonies, and the number of non-statutory aggravating factors. The logistic regression analysis suggests that the following six elements were the most significant factors in determining which offenders were sentenced to death:[254]

(1)The number of victims killed (0=single, 1=multiple victims);

(2) the existence and number of mitigating circumstances (0=one or more, 1=no mitigating factors);

(3) the existence and number of non-statutory aggravating factors (*e.g.*, post-mortem abuse, multiple efforts to kill, or binding and tying before the killing) (0=no factors, 1=one or more aggravating factors);

(4) the number of statutory aggravating circumstances

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254. The results of the logistic regression for the main determinants analysis is as follows:

| Explanatory Variable | Logit Coefficient | Odds Multiplier |
|---|---|---|
| Number of Victims | 1.3750* | 3.96 |
| Number of Offenders | .5053* | 1.66 |
| Mitigating Circumstances | −1.3221* | .27 |
| Statutory Aggravating Factors | .9797* | 2.66 |
| Non-Statutory Felonies | .7893* | 2.20 |
| Non-Statutory Aggravating Factors | .8496* | 2.34 |
| Victim/Offender Relationship | − .0252 | .98 |
| Prior Violent Record | − .4815 | .62 |
| Type of Weapon | − .4037 | .67 |

*These are the factors included in the main determinants scale.

(0=one statutory aggravating circumstance, 1=two or more);
(5) the number of felony offenses committed in addition to murder (0=no other felony offenses, 1=one or more);
(6) the number of offenders participating in the offense (0=one offender, 1=two or more offenders).

After identifying these six main determinants, two procedures were used to construct the fifteen subgroups of similar cases. In the first approach each of the 135 cases was scored from 0 to 6 depending upon the number of main determinants appearing in the case. No case had all six characteristics, so the scores ranged from 0 to 5. The death sentence frequency at each of these levels was then calculated. Finally, for each of the fifteen affirmed death sentences, the level corresponding to the number of main determinants in the case was located to identify similar cases and the frequency with which defendants in these were sentenced to death. Thus, similarity was defined by the total number of main determinants possessed, rather than by the specific determinant.

Table 20 presents the first set of results from the main determinants analysis. Level A of Table 20 reports the frequency of death sentences within each of six levels of matched main determinants. It shows that the likelihood of a death sentence increased as the number of main determinants increased. In the most aggravated category, containing five main determinants, the frequency of death sentences was over 70%. The same cannot be said for other categories. In categories with fewer than five main determinants the frequency of death sentences declined precipitously. Level B of Table 20 reports the number of main determinants for each of the fifteen affirmed death cases and the frequency of death sentences within its corresponding group of comparable cases.

Table 20: Probability of a Death Sentence Being Imposed Controlling for the Number of Main Determinants[a]

| A. Number of Main Determinants Controlled[c] | Probability of a Death Sentence |
|---|---|
| 0 | 0/6 (.000) |
| 1 | 1/27 (.037) |
| 2 | 6/41 (.146) |
| 3 | 6/32 (.188) |
| 4 | 6/20 (.300) |
| 5 | 7/9 (.778) |

B. Number of Main Determinants for Fifteen Affirmed Death Cases[b] (Death Sentencing Probability)

| | | | | | |
|---|---|---|---|---|---|
| Case #1 | 5 | (.777) | Case #9 | 3 | (.188) |
| Case #2 | 2 | (.146) | Case #10 | 5 | (.777) |
| Case #3 | 3 | (.188) | Case #11 | 2 | (.146) |
| Case #4 | 2 | (.146) | Case #12 | 3 | (.188) |
| Case #5 | 5 | (.777) | Case #13 | 2 | (.146) |
| Case #6 | 5 | (.777) | Case #14 | 2 | (.146) |
| Case #7 | 3 | (.188) | Case #15 | 1 | (.037) |
| Case #8 | 2 | (.146) | | | |

C. Proportion of Death Sentences Within the Group of Comparable Cases by the Main Determinants Method

| Probability of Death Sentence for Comparable Cases | Number of Affirmed Death Penalty Cases in This Category | Percent of All Affirmed Death Cases |
|---|---|---|
| Less than .25 | 11/15 | 73% |
| .26 - .50 | 0/15 | 0% |
| .51 - .75 | 0/15 | 0% |
| .76 - 1.00 | 4/15 | 27% |

[a] The main determinants are: Number of Victims; Number of Mitigating Circumstances; Number of Non-Statutory Aggravating Circumstances; Total Number of Statutory Aggravating Circumstances; Number of Non-Statutory Felonies; Number of Offenders.

[b] Although there are fifteen affirmed cases, some cases involve more than one defendant, and, therefore, more than one death sentence. In Part C the case is the unit of analysis.

[c] *See supra* note 254 for a description of the main determinants regression solution.

The results of this method of comparative death sentence review and the salient features method share some common results. A few affirmed death sentences are not comparatively excessive, since the frequency of death sentences in the group of similar cases is high. In Cases One, Five, Six, and Ten, approximately 78% of the similar cases also resulted in a death sen-

tence. The salient features method also shows the sentences in these cases to be nonexcessive. These four cases are clearly the most aggravated of the fifteen.

For several of these other cases the frequency of death sentences in the corresponding pool of similar cases is very low. The main determinants method shows that for eleven of these fifteen affirmed death cases (73%) the frequency of death sentences in the group of similar cases was under 25%. The main determinants method, then, identifies more comparatively excessive death sentences than does the salient factors method. One reason for the difference is that, in the main determinants analysis, each of the determinants is presumed equally influential in affecting who is sentenced to death. Thus, an armed robbery-murder by two defendants is deemed comparable to a rape-murder of two victims (both have one main determinant). The salient factors analysis, however, suggests that the *kind* of aggravating felony committed made a difference in who was sentenced to death, since that method shows that rapists who murder were more than twice as likely to be sentenced to death as were armed robbers. The logistic regression analysis also suggests that the main determinants had a differential impact on the likelihood of a defendant being sentenced to death.

Since these analyses indicate that the main determinants were not equally influential in determining who was sentenced to death, the main determinants were used in a second, slightly different manner.[255] Cases were matched in order of the importance of the main determinants, and the death sentencing frequency within successive groups of matched cases was calculated. For example, since the number of victims was the most important of the main determinants, single-victim homicides were separated from multiple-victim homicides and death sentence frequencies were calculated within each group. These were then matched according to the second main determinant—the presence of mitigating factors—and the frequency of death sentences was calculated. Cases were matched in this way for the three most important determinants. The presence of these main

255. The most important main determinants were, in order: number of victims, presence of mitigating circumstances, number of statutory aggravating factors, presence of non-statutory aggravating factors, and the number of non-statutory aggravating felonies. *See supra* note 254.

determinants in the fifteen affirmed death cases determined the corresponding category of comparable cases used to find the frequency of death sentences.

Figure 1 presents the results of a main determinants analysis of similar cases when the main determinants are sequentially matched according to their importance. For example, cases in the cell labeled "4H" have the following characteristics in common: a non-statutory aggravating factor, no mitigating circumstances, and two or more victims. In this group of cases the frequency of death sentences was 75%. Section A of Table 21 provides the case characteristics according to their main determinants for the fifteen affirmed death cases and the frequency of death sentences within each group of comparable cases. Section B of Table 21 summarizes this information. Again, this comparative review suggests that a minority of the fifteen affirmed death cases are clearly nonexcessive. In one case, 75% of the comparable cases resulted in a sentence of death. For most of the fifteen, however, the issue is not as clear. About one-third of the affirmed death cases fall into the category in which one-fourth to one-half of the similar cases resulted in a death sentence. Section A of Table 21 reveals that for most of these cases only one in three defendants in similar cases received a death sentence. In nine of these cases, however, the issue of comparatively excessive death sentences is a little less ambiguous. In six of these nine cases approximately 24% of defendants in similar cases were sentenced to death, while in three others the rate was 10% or less.

Figure 1: Proportion of Death Sentences in Comparable Cases: Controlling for the Four Most Important Main Determinants of the Decision to Impose a Death Sentence.

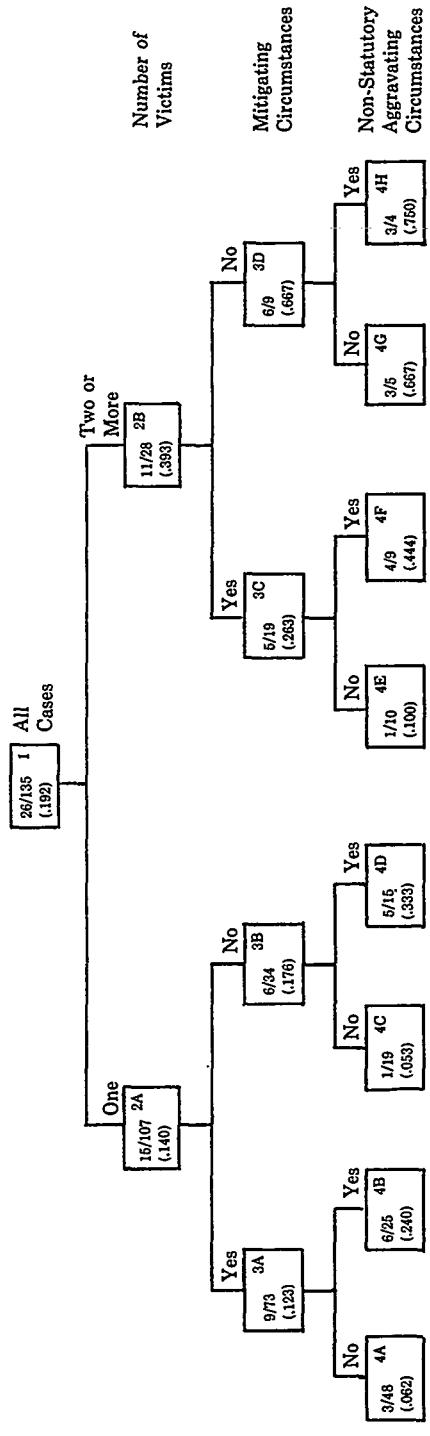

Table 21: Case Characterizations of Fifteen Affirmed Death Cases According to Three Most Important Main Determinants and the Frequency of Death Sentences Within Similar Cases

| A. Case Number | Case Category | Death Sentence Frequency |
|---|---|---|
| Case #1 | 4F | 4/9 (.444) |
| Case #2 | 4B | 6/25 (.240) |
| Case #3 | 4B | 6/25 (.240) |
| Case #4 | 4B | 6/25 (.240) |
| Case #5 | 4H | 3/4 (.750) |
| Case #6 | 4D | 5/15 (.333) |
| Case #7 | 4B | 6/25 (.240) |
| Case #8 | 4B | 6/25 (.240) |
| Case #9 | 4D | 5/15 (.333) |
| Case #10 | 4D | 5/15 (.333) |
| Case #11 | 4A | 3/48 (.062) |
| Case #12 | 4A | 3/48 (.062) |
| Case #13 | 4B | 6/25 (.240) |
| Case #14 | 4D | 5/15 (.333) |
| Case #15 | 4C | 1/19 (.053) |

B. Proportion of Death Sentences Within the Group of Comparable Cases by the Most Important Main Determinants

| Probability of Death Sentence for Comparable Cases | Number of Affirmed Death Penalty Cases in This Category | Percent of All Affirmed Death Cases |
|---|---|---|
| Less than .25 | 9/15 | 60% |
| .26 - .50 | 5/15 | 33% |
| .51 - .75 | 1/15 | 7% |
| .76 - 1.00 | 0/15 | 0% |

These findings are summarized in Section B of Table 21. For only six of these fifteen affirmed death sentences was the death sentencing frequency in the group of similar cases higher than 25%. For nine of these cases affirmed by the supreme court, approximately eight of ten comparable cases resulted in a sentence other than death.

*3. Overall Culpability Analysis of Comparatively Excessive Death Sentences.* Before concluding this section another alter-

native should be considered. In conducting its proportionality review the state supreme court may not focus on specific facts of a case, but may focus on the defendant's overall degree of culpability.[256] Rather than determining case similarity on the basis of matching particular features of the offense or offender, the state supreme court's procedure may be more closely replicated by first estimating the overall degree of aggravation in a case. Once this is done for all cases, the comparative sentence review proceeds by selecting those cases that are most similar to each affirmed death case according to the overall magnitude of aggravation. The frequency of death sentences within that group of similar cases is then estimated. This is the overall culpability method of comparative capital death sentence review.

The overall culpability of each defendant is estimated using factors that affect the probability that the offender will be sentenced to death. The probability of receiving a death sentence is estimated with a logistic regression equation with a dichotomous outcome variable (death or life sentence) and the following as predictors: prior violent record, number of victims, number of offenders, victim and offender relationship, presence of mitigating factors, type of weapon, number of statutory aggravating factors, number of non-statutory felonies, and the presence of non-statutory aggravating factors.[257] This multivariate logistic regression not only identifies those variables that best explain the im-

256. Some evidence indicates that at least some members of the court employ an estimation of a defendant's overall culpability. In State v. Adams, 279 S.C. 228, 306 S.E.2d 208, *cert. denied*, 464 U.S. 1023 (1983), Justice Littlejohn observed: "The facts are not the same in any two cases and, accordingly, our review of the facts relate largely to *degree of culpability* of the defendant and the *viciousness of the killing*." *Id.* at 241, 306 S.E.2d at 215 (emphasis added); *see also* cases cited *supra* note 242.

When listing cases similar to one under review, the court occasionally cites cases that differ widely in their specific features. Presumably this means that the court thinks that these cases are similar to the one under review because of the overall level of aggravation or culpability. For example, in the proportionality review in State v. Koon, 285 S.C. 1, 328 S.E.2d 625 (1984), *cert. denied*, 471 U.S. 1036 (1985), a kidnapping and murder of a young woman, Justice Gregory cited cases which included an armed robbery, kidnap, and rape of two victims; an armed robbery of a single victim; and a housebreaking and rape of an elderly woman. In affirming the death sentence of defendant Koon as proportionate, the court must have meant that Koon was as deserving as the others based on an overall assessment of egregiousness.

257. To purge the effect of racial variables on these legally relevant variables, the logistic regression equation was estimated with the race of the victim and offender included in the model. The logit weights for the racial variables were not included when the overall culpability score was calculated. *See supra* note 162 and accompanying text.

position of a death sentence, but the logistic coefficients weight these factors according to their importance. The overall culpability score for each case is created by summing the weights for each coefficient that was both statistically significant and in the expected direction.[258]

Table 22 reports the results of the overall culpability analysis. Section A presents the probability of a death sentence being imposed at seven levels of overall culpability. These levels were created by categorizing the 135 defendants into seven equally sized intervals based upon their culpability score. Defendants within each interval scored similarly on the culpability index, and each interval constitutes a group of comparable cases. The frequency of death sentences within each group of cases was then estimated. Section A demonstrates that the probability of a death sentence increased as the overall culpability of the offense increased. At the first level of culpability, representing the most minor offenses, no death sentences were imposed in eighteen cases. By the fifth level nearly one-fourth of the cases resulted in a death sentence. At the highest culpability level the frequency of death sentences was 80%.[259] Section B of Table 22 reports the frequency of death sentences within each group of similar cases.

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258. The logistic weights which comprise the culpability index are as follows:

| Variable | Maximum Likelihood Logit Coefficient |
|---|---|
| Number of Victims | 1.2252 |
| Number of Offenders | .6495 |
| Mitigating Circumstances | −1.0734 |
| Number of Statutory Aggravating Circumstances | .8645 |
| Number of Non-Statutory Felonies | .7019 |
| Number of Non-Statutory Aggravating Factors | .9595 |

Each of these variables was significant at $p<.10$. The culpability score is simply the sum of the logistic "weights" corresponding to the factors present in the offense. For example, a lone defendant who killed two victims after first robbing and raping them and who presented several factors in mitigation of the crime would have an overall culpability score of: 1.2252 + (-1.0734) + .8645 = 1.0163. To form the culpability levels in Section A of Table 22 the 135 individual culpability scores were rank ordered and collapsed into seven equally sized intervals.

259. The relationship between this seven-level culpability scale and the frequency of death sentences is both moderately strong and statistically significant ($X^2=37.74$, $p<.0001$, gamma=.66). The point biserial correlation coefficient between the culpability index and a death sentence was .44, $p<.0001$.

Section C summarizes these findings.

Table 22: Probability of a Death Sentence Being Imposed Within Categories of Comparable Cases Grouped by Overall Culpability Scores[a]

| A. Overall Culpability Level | Probability of A Death Sentence |
|---|---|
| 1 (low) | 0/18 (.000) |
| 2 | 1/20 (.050) |
| 3 | 4/32 (.125) |
| 4 | 4/23 (.174) |
| 5 | 4/17 (.235) |
| 6 | 5/15 (.333) |
| 7 (high) | 8/10 (.800) |

B. Culpability Level for Fifteen Affirmed Death Cases (Death Sentencing Probability)

| | | | | | |
|---|---|---|---|---|---|
| Case #1 | Level 7 | (.800) | Case #9 | 3 | (.125) |
| Case #2 | 6 | (.333) | Case #10 | 7 | (.800) |
| Case #3 | 4 | (.174) | Case #11 | 5 | (.235) |
| Case #4 | 3 | (.125) | Case #12 | 4 | (.174) |
| Case #5 | 7 | (.800) | Case #13 | 5 | (.235) |
| Case #6 | 7 | (.800) | Case #14 | 5 | (.235) |
| Case #7 | 4 | (.174) | Case #15 | 3 | (.125) |
| Case #8 | 2 | (.050) | | | |

C. Proportion of Death Sentences Within the Group of Comparable Cases by the Overall Culpability Method

| Probability of Death Sentence for Comparable Cases | Number of Affirmed Death Penalty Cases in This Category | Percent of All Affirmed Death Cases |
|---|---|---|
| Less than .25 | 10/15 | 67% |
| .26 - .50 | 1/15 | 7% |
| .51 - .75 | 0/15 | 0% |
| .76 - 1.00 | 4/15 | 27% |

[a] *See supra* text accompanying notes 255-257.

Again, the three empirical methods employed in our comparative sentence review are consistent. The salient features, main determinants, and now the overall culpability method have identified a small handful of death sentences as not excessive. Section B of Table 22 indicates that for Cases One, Five, Six, and Ten the frequency of death sentences in the group of cases

identified as similar in terms of overall culpability was 80%. Section A of Table 22 and the brief description of the case provided in Table 17A demonstrate that these four cases were highly aggravated and egregious killings. This empirical analysis of overall culpability suggests that a death sentence under these conditions is not comparatively excessive. This method also identifies, however, death sentences in which comparative excessiveness is a more serious possibility. In fact, except for the most aggravated cases mentioned above, the frequency of death sentences in the group of cases similar to each affirmed case was never greater than one in three. Section C of Table 21 suggests that, for ten of fifteen affirmed death sentences, the frequency of death sentences within the group similar in overall culpability was less than 25%. According to this method, about two-thirds of the affirmed death sentences imposed between 1977 and 1981 may have been comparatively excessive.

Arguably the group of similar cases is defined too broadly by our categorization process in Section A of Table 22, so that, even though the intervals are of equal size, they combine cases with diverse culpability magnitudes. If the pool of the similar cases is more narrowly drawn, then only the cases most similar to the one being reviewed would be considered as a similar case, and the frequency of death sentences, it could be argued, would increase. Such an argument has some merit, since the group of similar cases defined in culpability levels two through four have more than twenty cases. To test this theory, the group of similarly culpable cases was narrowed, and the frequency of death sentences within these more restricted groups was calculated. In addition, a conservative bias was created by selecting more cases that were higher in overall culpability than the one reviewed. Thus, the mean culpability score of the "similar" cases was actually higher than the case reviewed.

Section B of Table 23 indicates that this narrowing of the pool of similar cases also reduced somewhat the number of death sentences that appear to have been nonexcessive. This is not to say, however, that the problem of comparatively excessive death sentences has been eliminated. In four of the fifteen cases the frequency of death sentences in the pool of similar cases was over 70% (Section A of Table 23), but in five others it was approximately 30%. Even when the group of similar cases is narrowed and biased in favor of more culpable cases, a sizeable

number of comparatively excessive death sentences still exists. In six of the fifteen affirmed death sentences, the frequency of death sentences in the pool of similar cases was no more than two in ten.

Table 23: Probability of a Death Sentence Being Imposed Within Groups of Similarly Culpable Cases Defined by Overall Culpability Scores

A. Death Sentence Frequency Within Similar Cases for Each of Fifteen Affirmed Death Sentences

| | | | | | |
|---|---|---|---|---|---|
| Case #1 | 6/7 | (.857) | Case #9 | 4/11 | (.364) |
| Case #2 | 7/15 | (.467) | Case #10 | 8/11 | (.727) |
| Case #3 | 2/13 | (.154) | Case #11 | 1/11 | (.091) |
| Case #4 | 4/11 | (.364) | Case #12 | 2/13 | (.154) |
| Case #5 | 6/7 | (.857) | Case #13 | 3/17 | (.176) |
| Case #6 | 6/7 | (.857) | Case #14 | 3/17 | (.176) |
| Case #7 | 4/13 | (.308) | Case #15 | 4/11 | (.364) |
| Case #8 | 1/9 | (.111) | | | |

B. Proportion of Death Sentences Within the Group of Similar Cases by the Overall Culpability Method

| Probability of Death Sentence for Similar Cases | Number of Affirmed Death Penalty Cases in This Category | Percent of All Affirmed Death Cases |
|---|---|---|
| Less than .25 | 6/15 | 40% |
| .26 - .50 | 5/15 | 33% |
| .51 - .75 | 1/15 | 7% |
| .76 - 1.00 | 3/15 | 20% |

In sum, this analysis has applied three empirically grounded approaches to comparative capital sentence review for death sentences imposed in South Carolina during the first few years of the administration of its procedurally reformed capital punishment statute. These three methods provide generally consis-

tent results, and it is this consistency across three different empirical approaches to proportionality review that strengthens the conclusion of this Article. When a murder was particularly egregious, consisting of several statutory aggravating felonies, multiple victims, and an additional brutal battery, a death sentence was regularly imposed throughout the state. Under these conditions, a death sentence was not comparatively excessive. In a larger group of cases whose size varied only according to the particular method of comparative sentence review used, the frequency of death sentences in the group of similar cases was under 25%. The death sentences in this group of cases may have been comparatively excessive. The proportion of noncapital sentences imposed in these cases is so large that the occasional imposition of a death sentence may be described only as "freakish." Although some factors may differentiate these "freakish" cases from the norm in the pool of similar cases,[260] no *meaningful* distinction exists that could reasonably and rationally justify such an enormous difference in penalty.

One would presume, then, that the state supreme court's proportionality review would have found these death sentences excessive. Nonetheless, all of the fifteen cases examined here were affirmed by the court and found to be proportionate to the penalty imposed in similar cases. In fact, during the period covered by this study the state supreme court did not invalidate a single death sentence for being comparatively excessive. How is it that this study, using several empirical methods, identifies a group of death cases for which the frequency of death sentences in similar cases is low enough to compel the conclusion that they are comparatively excessive, and yet the state supreme court found *none* of these penalties to be disproportionate? This Article outlines both a theory of proportionality review and an appropriate methodology to pursue the goal of proportionate capital sentencing. It is now time to examine the approach taken by the South Carolina Supreme Court in this endeavor. The differences may be due to dissimilarity in theory, methodology, or both.

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260. *See supra* notes 245, 249, and 250.

### *E. Comparative Capital Sentence Review in South Carolina: The Theory and Methodology of the State Supreme Court*

The first task of this section is to answer the question left unanswered at the end of the preceding section: Why has the South Carolina Supreme Court failed to find any death sentence comparatively excessive when these empirical analyses suggest that at least one-third of the fifteen affirmed death sentences may be excessive? The answer is easy, yet difficult to untangle. The reason the court has failed to find any of these fifteen death sentences comparatively excessive is that *it simply does not conduct a comparative sentence review.* As noted earlier,[261] South Carolina's death penalty statute states only that the court's function in conducting its proportionality review is to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[262] The statute does not clearly express the court's duty. Hubbard noted, in an earlier analysis of the administration of capital punishment in South Carolina, that the conduct of a proportionality review of death cases may take the form of an "objective" or "relative" model.[263] Under the objective model of proportionality review, the reviewing court determines whether the defendant is morally opprobrious enough to "deserve" the death penalty.[264] Under a comparative model, proportionality requires that similarly situated defendants be punished with similar severity.[265]

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261. *See supra* pp. 338-39.

262. S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1987).

263. *See* Hubbard, Burry & Widener, *supra* note 143. For a detailed philosophical examination of absolute and comparative proportionality review, see Radin, *supra* note 202.

264. Using whatever it deems appropriate (a philosophy of punishment, moral or ethical philosophy, or an understanding of community or cultural values) a court using an objective model of proportionality review is not concerned with the fact that like cases should be punished similarly. The issue involves a determination that the offender and offense are so egregiously offensive that capital punishment is deserved. There is, then, no real comparative review of the penalty imposed in other cases. The court conducting this review will, however, in justifying its determination that *this* offender deserves death, at times cite other instances in which it has approved (affirmed) another death sentence which it feels was equally deserving.

265. The "relative" or comparative model of proportionality review is fundamentally different from the objective model both in terms of how it is conducted, and, as we shall later see, what abuses of power against which it protects. When a court employs a com-

As Hubbard pointed out, the South Carolina Supreme Court seems to have used the objective model of proportionality review between 1977 and 1981.[266] This is evident in the state supreme court opinions affirming death sentences. This Article will demonstrate both the model that the court has adopted in its affirming opinions and the theory of capital sentencing it implicitly and explicitly embraced in doing so. Table 24 presents a summary of the fifteen capital cases in which death sentences were affirmed by the court during this period. It reports the name of the case, the date the sentence was affirmed, the author of the majority opinion, the model of proportionality review used, and a brief extract from the case which embodies the court's theory of proportionality review.

A perusal of Table 24 suggests the court has not applied a consistent model of proportionality review. In South Carolina the practice is to assign to the judge penning the opinion not only the type of review conducted, but also the selection of similar cases. This explains why the review procedure appears so disparate among judges and by the same judge at different times.

Although Hubbard[267] correctly stated that the court has adopted an objective model of proportionality, this model may assume two different forms. In the first approach, the court simply reviews the facts of the case and determines that death is a reasonably appropriate penalty for a particular offense. Under this reasonableness approach,[268] the court neither reviews nor cites other cases, but simply concludes that the circumstances of the case warrant the death penalty. In the second, precedent seeking approach, the court also objectively determines that a particular case is morally offensive enough to warrant a death sentence. To justify this conclusion, however, it also cites one or more affirmed cases that are similar to the case under review in selected facts (fact specific) or in overall aggravation (overall harm).

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parative model of proportionality review it compares the death sentence imposed for the defendant whose sentence is being reviewed with the penalty imposed on defendants whose crime and culpability are deemed comparable.

266. Hubbard, Burry & Widener, *supra* note 143, at 441-45.

267. *Id.*

268. *See supra* p. 339.

Table 24: Chronology of Affirmed Death Cases in South Carolina for Offenses Committed During 1977-1981

| Case | Date Affirmed | Justice Writing Opinion | Model of Proportionality Review |
|---|---|---|---|
| State v. Shaw, 273 S.C. 194, 255 S.E.2d 779, *cert. denied*, 444 U.S. 957 (1979). Case #1. | 5/28/79 | Justice Gregory | First death case reviewed by the court; hint that the model would entail a comparative review, but no comparable cases found. |
| State v. Hyman, 276 S.C. 559, 571, 281 S.E.2d 209, 215 (1981), *cert. denied*, 458 U.S. 7122 (1982). Case #3 | 7/22/81 | Justice Ness | Reasonableness Model: "The death penalty is proportionate to a crime of this nature . . . ." No similar cases cited. |
| State v. Gilbert, 277 S.C. 53, 60, 283 S.E.2d 179, 182 (1981), *cert. denied*, 456 U.S. 984 (1982). Case #2. | 9/14/81 | Justice Ness | Precedent Seeking Model: "Considering the record in this case and comparing it with *State v. Shaw* and *Roach*, and *State v. Hyman*, we find the death penalty is proportionate to a crime of this nature . . . ." (citations omitted). Comparability based on overall harm. |
| State v. Thompson,* 278 S.C. 1, 6 n.1, 292 S.E.2d 581, 584 n.1, *cert. denied*, 456 U.S. 938 (1982). Case #15. | 1/7/82 | Justice Harwell | Precedent Seeking Model: "we have determined that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. *State v. Shaw*; *State v. Hyman*; *State v. Gilbert*." (citations omitted). Comparability based on overall harm. |

| Case | Date Affirmed | Justice Writing Opinion | Model of Proportionality Review |
|---|---|---|---|
| State v. Butler, 277 S.C. 452, 458, 290 S.E.2d 1, 4, *cert. denied*, 459 U.S. 932 (1982). Case #4 | 2/22/82 | Justice Ness | Reasonableness Model: "The record clearly reflects appellant maliciously and purposefully committed a brutal murder accompanied by rape. The death penalty is proportionate to a crime of this nature . . . ." No similar cases cited. |
| State v. Copeland, 278 S.C. 572, 595, 300 S.E.2d 63, 77 (1982), *cert. denied*, 460 U.S. 1103 (1983). Case #5 | 11/10/82 | Justice Gregory | Precedent Seeking Model: After reviewing the facts of six previously affirmed death sentences, the court noted: "In view of the facts set forth above, however, we are satisfied that the sentence of death imposed on each of these appellants was appropriate and neither excessive nor disproportionate in light of their crimes and their respective characters." Comparability based on overall harm. |
| State v. Woomer, 278 S.C. 468, 476, 299 S.E.2d 317, 322 (1982), *cert. denied*, 463 U.S. 1229 (1983). Case #6. | 12/20/82 | Justice Gregory | Precedent Seeking Model: "the sentence of death is neither excessive nor disproportionate in light of this crime and this defendant. . . . [W]e have upheld a comparable sentence in the comparable case of *State v. Shaw* . . . ." Comparability based on fact similarity. |

| Case | Date Affirmed | Justice Writing Opinion | Model of Proportionality Review |
|---|---|---|---|
| State v. Yates, 280 S.C. 29, 45, 310 S.E.2d 805, 814 (1982), *cert denied*, 462 U.S. 1124 (1983). Case #7. | 12/22/82 | Per Curiam | Precedent Seeking Model: "We are satisfied that the penalty here imposed is neither excessive nor disproportionate in light of this crime and this defendant. . . . [W]e have upheld a comparable sentence in the comparable case of *State v. Gilbert* . . . ." (citation omitted). Comparability based on fact similarity. |
| State v. Adams, 279 S.C. 228, 241-42, 306 S.E.2d 208, 215-16, *cert. denied*, 464 U.S 1023 (1983). Case #8. | 6/29/83 | Justice Littlejohn | Precedent Seeking Model: "The facts are not the same in any two cases and, accordingly, our review of the facts relate largely to degree of culpability of the defendant and the viciousness of the killing. . . . Our comparison includes: [six previously affirmed death cases cited]. . . . We find that the penalty imposed is not disproportionate . . . ." Comparability based on overall harm. |
| State v. Spann, 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983), *cert. denied and appeal dismissed*, 466 U.S. 947 (1984). Case #9. | 10/13/83 | Justice Harwell | Precedent Seeking Model: "The facts here are sufficiently egregious to justify a punishment of death. . . . (See the capital cases cited in *State v. Adams*). (citation omitted). Comparability based on overall harm. |

| Case | Date Affirmed | Justice Writing Opinion | Model of Proportionality Review |
|---|---|---|---|
| State v. Plath, 281 S.C. 1, 20, 313 S.E.2d 619, 630, *cert. denied*, 468 U.S. 1226 (1984). Case #10. | 1/17/84 | Justice Lewis | Precedent Seeking Model: "[W]e are convinced that the sentence of death is neither excessive nor disproportionate in light of this crime and these defendants. The atrocious nature of this murder resembles in some respects the cases of *State v. Shaw* and *State v. Woomer*." (citations omitted). Comparability based on fact similarity. |
| State v. Patterson, 285 S.C. 5, 12, 327 S.E.2d 650, 654 (1984), *cert denied*, 471 U.S. 1036 (1985). Case #12. | 10/10/84 | Justice Harwell | Precedent Seeking Model: "[I]n light of the nature of the crime and the appellant's character, the sentence must be affirmed. (See cases collected in *State v. Koon*)." (citation omitted). Comparability based on overall harm. |
| State v. Truesdale, 285 S.C. 13, 21, 328 S.E.2d 53, 57 (1984), *cert. denied*, 471 U.S. 1009 (1985). Case #13. | 10/31/84 | Justice Chandler | Reasonableness Model: "We find the sentence is not excessive or disproportionate to that imposed in similar cases. The death penalty is fully justified by the brutal homicide, accompanied by rape, reflected in the evidence of this case. The crime was heinous." No similar cases cited. |

| Case | Date Affirmed | Justice Writing Opinion | Model of Proportionality Review |
|---|---|---|---|
| State v. Koon, 285 S.C. 1, 4, 328 S.E.2d 625, 628, *cert denied*, 471 U.S. 1036 (1985). Case #11. | 4/3/85 | Justice Gregory | Precedent Seeking Model: "In determining whether or not the sentence imposed here is excessive or disproportionate in light of the crime and appellant, we have considered the previous cases where the death penalty was imposed by the trial court . . . : [Twelve previously affirmed cases cited]." Comparability based on overall harm. |
| State v. Elmore,** 286 S.E. 70, 75, 332 S.E.2d 762, 765 (1985), *vacated*, ___ U.S. ___, 106 S. Ct. 1942 (1986). Case #14. | 5/16/85 | Justice Gregory | Precedent Seeking Model: "A comparison of the facts of this case with other death penalty cases demonstrates appellant's death sentence is not disproportionate. . . . *See State v. Singleton*, *State v. Chafee* [sic] *and Ferrell, and State v. Spann.*" (citations omitted). Comparability based on specific facts. |

* In this case appellant Thompson was initially sentenced to death and had his sentenced affirmed. The state Supreme Court later vacated the death sentence on post-conviction relief. Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984). Because the sentence was first subject to a proportionality review and affirmed, we include it in the table and discussion.

** Appellant Elmore was also initially sentenced to death, and his sentence was affirmed by the South Carolina Supreme Court. Even though the sentence was vacated by the United States Supreme Court, the case is included here because it was subject to a proportionality review by the state supreme court.

The court's first occasion to conduct a proportionality review was in *State v. Shaw*.[269] The crimes in this case were committed only a few months after the state's new capital punishment statute took effect and the death sentence was affirmed less than two years later. Nevertheless, by the time the death sentences were affirmed in 1979, enough cases had accumulated to conduct a true comparative proportionality review. Ironically, the court suggested that it may be interested in conducting a comparative form of proportionality review: "We have compared the death sentences imposed upon appellants with the sentences imposed in *all prior capital cases tried under the current death penalty statutes* . . . ."[270] Unfortunately, the court failed to find any comparable cases, but did not detail its search for comparable cases. As is often the case, the court's discussion of its theory or model of proportionality review was quite terse and bereft of any detail or analysis.

Any prospect that the court would develop a truly comparative model of proportionality review was dealt a blow in the second death sentence it affirmed. In *State v. Hyman*[271] Justice Ness, writing for the court, employed a reasonableness model of proportionality review: "The record clearly reflects appellant planned, prepared and committed a brutal crime for the purpose of obtaining money. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case."[272] The court did not even suggest that the statute required a comparative review. Indeed, contrary to the statute,[273] it made no reference to other cases. In a posture of objective retribution, the court simply found the death sentence proportionate to the particular defendant.

*State v. Gilbert*[274] presented the third opportunity for the court to define and outline its theory of proportionality review. Unfortunately, the discussion was again too brief. In fact, Justice Ness devoted but *one sentence* to it: "Considering the record in this case and comparing it with [*Shaw*] and [*Hyman*], we

269. 273 S.C. 194, 255 S.E.2d 799 (1979), *cert. denied*, 444 U.S. 1026 (1980).

270. *Id.* at 211, 255 S.E.2d at 807 (emphasis added) (footnote omitted).

271. 276 S.C. 559, 281 S.E.2d 209 (1981), *cert. denied*, 458 U.S. 1122 (1982).

272. *Id.* at 571, 281 S.E.2d at 215.

273. S.C. CODE ANN. § 16-3-25(E) (Law. Co-op. 1987) ("The court shall include in its decision a reference to those similar cases which it took into consideration.").

274. 277 S.C. 53, 283 S.E.2d 179 (1981), *cert. denied*, 456 U.S. 984 (1982).

find the death penalty is proportionate to a crime of this nature and to the crime and defendants in this case."[275]

The adumbrated *Gilbert* opinion does suggest the parameters of the court's proportionality review and implicitly offers an operative theory. Justice Ness did not examine the usual penalty for an offense of similar culpability, but focused on the offense and offender in *this* case. The court was not interested in ensuring equal treatment of appellants and similarly situated defendants, but was interested instead in ensuring that appellants' death sentences were warranted by the culpability of their actions. This inference is possible because the cases Justice Ness cited as similar were two previously affirmed death cases. One was a kidnapping, rape, and armed robbery with post-mortem abuse, and the other was an armed robbery-murder. They are similar to *Gilbert* only in the sense that the court had determined they were egregious enough to deserve death and that *Gilbert* falls into that moral category. In citing only affirmed death cases as truly comparable to the one at hand, the court implied that proportionality means proportionate to the moral harm of the offense (objective proportionality) not proportionate to sentences imposed on similarly situated offenders (comparative proportionality).[276] Although not explicitly promulgating its theory, the court continued in the next two cases to regard a proportionate death sentence as one that is warranted for the individual characteristics of the offense and offender, and continued to cite only affirmed death cases as comparable.[277]

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275. *Id.* at 60, 283 S.E.2d at 182 (citations omitted).

276. Unlike *Shaw*, by the time *Gilbert* was decided in September of 1981 a sufficiently large pool of armed robbery-murders had occurred in South Carolina for the court to conduct a true comparative review. Its failure to attempt such a review, or even to suggest that it may be important, indicates that the court rejected a comparative model of review. This becomes clear in subsequent opinions.

277. In State v. Thompson, 278 S.C. 1, 292 S.E.2d 581, *cert. denied*, 456 U.S. 938 (1982), Justice Harwell adopted a model of proportionality review identical to Justice Ness's approach in *Gilbert*. Justice Harwell recounted the facts of Thompson's crime—that he shot a store owner while robbing him and shot him again while departing—and held that death was neither excessive nor disproportionate for a crime of this nature. Since he cited only affirmed cases Justice Harwell must have meant that the penalty was not excessive for this crime, rather than in relation to the penalty generally imposed in previous armed robbery-murders in South Carolina. Justice Harwell provided no other discussion. In State v. Butler, 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982), decided one month after *Thompson*, Justice Ness abandoned the precedent seeking model he employed in *Gilbert* and returned to a reasonableness approach first

Although implicit in earlier cases, the court's theory of proportionality review became explicit in *State v. Copeland*.[278] In *Copeland* the court made a series of important pronouncements about how it views and conducts a proportionality review.[279] The court's theory of proportionality is derived from its interpretation of the United States Supreme Court's development of death penalty doctrine since *Furman v. Georgia*.[280] According to *Copeland* the lesson to be drawn from this doctrine is that "a profound tension [exists] between the requirement of individualized sentencing and the notion of comparative review."[281] The *Copeland* court correctly noted that some United States Supreme Court decisions suggest that a constitutional death penalty statute must allow for the individualization of death sentences, but others demand consistent or evenhanded

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used in *Hyman*. *Thompson* illustrates the court's use of the objective model. In a two sentence discussion, Justice Ness noted that appellant Butler "committed a brutal murder accompanied by rape" and that the death penalty is "proportionate to a crime of this nature." *Id.* at 458, 290 S.E.2d at 4. He cited no similar cases.

278. 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 460 U.S. 1103 (1983).

279. The court in *Copeland* first noted that the statute "plainly and properly" leaves to the discretion of the court the task of defining a "similar" case and of choosing the method of capital sentence review. *Id.* at 585, 300 S.E.2d at 72. It then noted that both the language of the statute and the task of proportionality review itself "give rise to perplexity." *Id.* This is not entirely true. As previously noted, when the South Carolina general assembly framed the 1977 Act it looked to Georgia's statute approved in Gregg v. Georgia, 428 U.S. 153 (1976). *See supra* notes 213-14 and accompanying text. The *Copeland* court, in defining its task of proportionality review, could have considered the United States Supreme Court's discussion of sentencing review in *Gregg*. It would have found that the Court presumed that the Georgia Supreme Court would conduct a true comparative review to determine the frequency of life and death sentences for similarly circumstanced defendants. Justice Stewart stated in *Gregg*:

> the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

428 U.S. at 206 (plurality opinion). In addition, the Georgia statute explicitly stated that the universe of similar cases should include *all murder convictions* in which sentence was imposed after January 1, 1970. GA. CODE ANN. § 27-2537(f) (1983). Recent empirical investigations suggest that in practice the Georgia Supreme Court may only include death sentences and appealed life sentences, and those cases in which a penalty trial was actually held. *See* Baldus, Pulaski & Woodworth, *supra* note 105; Bowers, *supra* note 84. Even though the revelations of *Gregg* were published before the *Copeland* decision, the court could have conducted its investigations of proportionality review along the lines of Justice Stewart's discussion of the Georgia scheme in *Gregg*.

280. 408 U.S. 238 (1972).

281. 278 S.C. at 587, 300 S.E.2d at 72.

sentencing.

The progeny of the individualization principle includes *Woodson v. North Carolina*,[282] *Roberts v. Louisiana*,[283] and *Lockett v. Ohio*.[284] In striking down North Carolina's mandatory death penalty statute, Justice Stewart, writing for the plurality in *Woodson*, noted that to comport with the fundamental respect for human dignity underlying the eighth amendment[285] "requires consideration of the character and record of the individual offender and the circumstances of the particular offense."[286] Chief Justice Burger sounded the need for the individualization of death sentences even more forcefully in *Lockett*: "we cannot avoid the conclusion that an individualized decision is essential in capital cases."[287] Burger clearly emphasized in his majority opinion that the vice of the Ohio statute was its failure to grant the "degree of respect due the uniqueness of the individual."[288]

The progeny of the consistency principles in capital sentencing includes *Furman*,[289] *Gregg*,[290] and *Godfrey*.[291] *Furman*, if nothing else, condemned the lack of consistent and evenhanded application of the death penalty.[292] The *Gregg* Court approved guided discretion death statutes because on their face they would ensure that "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."[293] The requirement of consistency in the application of the death penalty was also a theme in *Godfrey*. Writing for the plurality, Justice Stewart interpreted the Court's previous decisions to mean "that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary

282. 428 U.S. 280 (1976).
283. 428 U.S. 325 (1976).
284. 438 U.S. 586 (1978).
285. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).
286. 428 U.S. at 304.
287. 438 U.S. at 605.
288. *Id.*
289. Furman v. Georgia, 408 U.S. 238 (1972).
290. Gregg v. Georgia, 428 U.S. 153 (1978).
291. Godfrey v. Georgia, 446 U.S. 420 (1980).
292. See *supra* note 11 and accompanying text.
293. 428 U.S. at 206-07 (plurality opinion).

and capricious infliction of the death penalty."[294] The court reversed Godfrey's death sentence because Georgia failed to impose death sentences consistently on the defendants whose crimes fell into Godfrey's category, so that there was no " 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which [the penalty] is not.' "[295]

The Court has required two principles for capital sentencing—the principle of consistency, to ensure that death sentences are meted out in an evenhanded manner, and the principle of individualization, to ensure that the process treats each individual with the dignity due them as humans. The South Carolina Supreme Court in *Copeland* was certainly correct when it noted that an inevitable tension exists between these two constitutional mandates.[296] To consider fully the uniqueness of the individual in sentencing requires maximum discretion which simultaneously provides the opportunity for inconsistent treatment of equals: "that which is unique is also incommensurable. Herein lies the conflict between particularized sentencing (and review) and the notion of comparing 'similar cases.' "[297]

The *Copeland* court hoped to solve this dilemma with both a linguistic sleight of hand and a selective reading of federal constitutional law. Even though Supreme Court decisions require *both* individualized and consistent capital sentencing, the *Copeland* court downgraded the importance of the latter, concluding that "the final resolution of a given appeal, if sentence is to be affirmed, should rest upon the unique correctness of the result in the given instance rather than its *coarse resemblance* to other cases."[298] The court in *Copeland*, then, found that the United States Supreme Court's reluctance either to find proportionality

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294. 446 U.S. at 428.

295. *Id.* at 427 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)) (brackets in original).

296. Both requirements are embedded in the eighth amendment's "dignity of man" element. Capricious justice fails to treat human beings equally and hence fails to accord them respect and dignity. Similarly, by not considering all the idiosyncratic features of an offense or of an offender the court fails to treat people as unique, individual human beings and hence fails to treat them with the respect and dignity they deserve. *See* Radin, *supra* note 200.

297. State v. Copeland, 278 S.C. 572, 587, 300 S.E.2d 63, 72 (1982), *cert. denied*, 460 U.S. 1103 (1983).

298. *Id.* at 588, 300 S.E.2d at 72 (emphasis added).

review a constitutional requirement or to impose any model of appellate review on the states meant that it, too, recognized the tension between consistency and individualization. The court in *Copeland* also reasoned that the states may decide the relative importance of the two interests and that federal case law does not suggest that equal protection requires proportionality review. The *Copeland* court stated that a reviewing court's interest is in the *outcome* of capital sentencing; it is concerned with "preventing the imposition of excessive and disproportionate punishment upon the individual petitioner."[299] The *Copeland* court believed that it should use its own judgment to determine proportionality. It also thought that the eighth amendment's only requirement is to secure a particular outcome—that each death sentence imposed be deserved on its *individual merits*:

> It is thus apparent that the Eighth Amendment to the U.S. Constitution does not mandate any mode of appellate review, or even appellate review as such, but only an outcome. That outcome, again, is a penalty imposed on a meaningful basis which can be sustained as neither excessive nor disproportionate in light of the crime and the defendant.[300]

The *Copeland* court resolved the constitutional tension in favor of individualized sentencing and pronounced that its theory of proportionality review is based on individual just deserts: if a death sentence is deserved in light of the unique features of the offense and individual offender it will not be reversed as excessive or disproportionate, no matter how infrequently it is imposed in other, similar cases. The court also explicitly stated that its individually centered, objective theory of proportionality is entirely of the court's *own construction*. The court relied on Justice White's conclusion in *Coker v. Georgia*[301] that " 'in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.' "[302] The South Carolina Supreme Court announced:

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299. *Id.* at 590, 300 S.E.2d at 73-74. The court cited Coker v. Georgia, 433 U.S. 584 (1977), for this proposition.

300. 278 S.C. at 590, 300 S.E.2d at 74.

301. 433 U.S. 584 (1977).

302. 278 S.C. at 590, 300 S.E.2d at 74 (quoting *Coker*, 433 U.S. at 598). In the case in which it first reviewed a death sentence, the court hinted that it was interested in a true comparative review with a broadly defined universe of cases that included life

> We recognize that in some jurisdictions and commentaries it is felt that the reviewing court should compare a given death sentence with a "universe" of cases which includes sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests.
>
> . . . .
>
> This Court would enter a realm of pure conjecture if it attempted to compare and contrast such verdicts with an actual sentence of death. . . . We will not subject these verdicts to scrutiny in pursuit of phantom "similar cases," when a meaningful sample lies ready at hand in those cases where the jury has spoken unequivocally.[303]

In the end, the *Copeland* court, as the court had done in earlier cases, determined that no case truly comparable to the one at hand existed, but concluded, nonetheless, that the imposed death sentence was neither excessive nor disproportionate. To buttress its conclusion, the court cited other cases in which a death sentence had been affirmed and suggested that the case under review fell into the same category as the other affirmed cases.

The die was cast with the state supreme court's ruling in *Copeland*, and its theory and methodology of proportionality re-

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sentences as well, but it was unable to identify any similar cases: "We have compared the death sentences imposed upon appellants with the sentences imposed in all prior capital cases tried under the current death penalty statutes and are satisfied that there are no similar cases against which the proportionality of the sentences imposed upon appellants can be measured." State v. Shaw, 273 S.C. 194, 211, 255 S.E.2d 799, 807 (footnote omitted), *cert. denied*, 444 U.S. 957 (1979). This theme was re-expressed in *Copeland*, in which the court stated that it may engage in comparative review after first determining that the death sentence being reviewed was not disproportionate in the individual, absolute sense; but again, the court could find no truly similar cases. It stated that

> [i]t is our conclusion that no "similar" case exists that would permit meaningful comparative review of these death sentences. . . . .
>
> [P]roportionality review in South Carolina is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant. Comparative review will be thereafter undertaken if possible. . . .

278 S.C. at 595, 300 S.E.2d at 77. In these and other cases the court's inability to find similar cases stems from its apparent desire to find a group of *precisely identical* cases to the one reviewed. This self-imposed requirement meant that in many affirmed cases the court could find no similar cases. For instance, the court found in one case that "[n]one of these cases presents facts comparable to this case." State v. Koon, 285 S.C. 1, 4, 328 S.E.2d 625, 627, *cert. denied*, 471 U.S. 1036 (1985). In another case, the court found itself "[l]acking precisely identical cases with which to compare these verdicts." State v. Plath, 281 S.C. 1, 20, 313 S.E.2d 619, 630, *cert. denied*, 467 U.S. 1265 (1984).

303. *Copeland*, 278 S.C. at 591, 300 S.E.2d at 74.

view was articulated fully. In subsequent cases the court followed the *Copeland* model with only minor variation.[304] Generally, in the later cases, after recounting the facts, the court noted that in light of the particular facts a sentence of death was neither excessive nor disproportionate. For example, the court in *State v. Spann* stated, "The facts here are sufficiently egregious to justify a punishment of death."[305] Generally, the court then would cite affirmed death cases that were either somewhat factually similar to the one under review or similar in overall culpability.

### *F. Adequacy of the South Carolina Supreme Court's Theory and Practice of Proportionality Review*

The theory of proportionality review adopted by the South Carolina Supreme Court in *Copeland* is an inadequate basis on which to justify the infliction of capital punishment. It misdefines both the lesson of *Furman* and a key theme in United States Supreme Court doctrine since *Furman*. The *Copeland* court correctly observed that a constitutional mandate of capital sentencing is the consideration of the "uniqueness of the individual."[306] At least it recognized that the United States Supreme Court also mandated *evenhanded* sentencing, a central component of the Court's decisions in *Furman*, *Gregg*, *Proffitt*, and *Godfrey*. The *Copeland* court also explicitly recognized an inevitable tension between the mandates to individualize and to make consistent capital sentences.[307]

The *Copeland* court presumed that, since the United States

304. After *Copeland*, the court next discussed its theory of proportionality review in State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982) (per curiam), *cert. denied*, 462 U.S. 1124 (1983), *cert. granted and judgment vacated sub nom.* Yates v. Aiken, 474 U.S. 896 (1985). *Yates* presented a particularly good opportunity for the court to develop a theory of comparative review. Yates, a co-felon who did not himself commit the murder, was sentenced to death under a vicarious liability doctrine. In the course of an armed robbery, Yates shot and wounded one victim and his co-offender stabbed another to death. In determining the excessiveness of Yates's death sentence, the court could have examined the frequency of death penalty requests and impositions for non-triggermen. Instead, the court again used the proportionality theory espoused in *Copeland*, focusing on Yates's *individual* culpability.

305. 279 S.C. 399, 404, 308 S.E.2d 518, 521 (1983), *appeal dismissed and cert. denied*, 466 U.S. 947 (1984).

306. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

307. 278 S.C. at 587, 300 S.E.2d at 72.

Supreme Court had not constitutionally required comparative review, it was concerned solely with the *outcome* of capital sentencing. Assuming, *arguendo*, that the United States Supreme Court is concerned with outcome, the *Copeland* court erred, nonetheless, in its interpretation of what the term "outcome" means. Relying on *Coker*,[308] which applied traditional, substantive eighth amendment analysis, the *Copeland* court concluded that the outcome which the Supreme Court's doctrine contemplates is the prevention of undeserved punishment in the absolute retributive sense—permitting a death sentence if it is justly deserved in the individual case, regardless of its deservedness in relation to other, similar cases. The court emphatically stated in *Copeland* (and restated in *Yates*) that it alone had the authority to decide when a defendant deserves a death sentence, although it referred to previously affirmed death sentences to guide its judgment.

Although the *Copeland* theory adhered to the principle of individualized death sentences, it did so at the expense of the consistency principle equally well-established in the United States Supreme Court's post-*Furman* doctrine. To illustrate, in *State v. Patterson*[309] the state supreme court affirmed the death sentence of appellant Patterson who robbed and killed with a shotgun the clerk of a convenience store. True to *Woodson* and *Lockett*, the sentence was individualized. Contrary to *Furman* and *Gregg*, however, the sentence in *Patterson* was not a *consistent* one. In South Carolina, defendants whose only aggravating offense is armed robbery-murder are not generally sentenced to death. Indeed, this is a highly unlikely result, as Tables 18, 20, 21, 22, and 23 demonstrate. The *Patterson* court probably would argue, however, that this was not a "normal" armed-robbery murder, considering its particularly egregious nature (thirty to forty pellet wounds in the victim's head), and death, therefore, was deserved in *this* case, if not in the others.

Although seductively appealing, this theory cannot withstand constitutional scrutiny because capital sentences must be consistent as well as individualized. *Furman* invalidated existing death penalty statutes not because individual death sentences

308. 433 U.S. 584 (1977).

309. 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied*, 471 U.S. 1036 (1985). *See supra* note 250 and accompaying text for a discussion of *Patterson*.

could not be justified, but because the *pattern* of imposed death sentences revealed the capricious applications of the statutes. Similarly, the procedural reforms announced in *Gregg* were to enhance the consistent and evenhanded imposition of death sentences.

This study should not devalue the importance of individualized death sentences, but should serve as a reminder that another fatal infirmity identified in previous death cases is the absence of evenhanded sentencing. South Carolina's individually centered theory of proportionality review offers virtually no control for the comparatively excessive death sentence. The South Carolina Supreme Court's theory of proportionality review is particularly disturbing because it is virtually immune to error. Under its theory of individual, absolute proportionality, practically any death sentence can be found proportionate by the mere existence of any aggravating circumstance, no matter how aberrant it is in terms of sentencing *patterns*. As previously noted, the court has yet to invalidate a death sentence as comparatively excessive. The unfortunate result of this theory of individualized proportionality review is that in many cases it has led the court into the pronounced folly of considering the most arcane features of a homicide as relevant, meaningful bases for a sentence of death.[310] In reconciling the tension between individualized and consistent capital sentencing, the theory adopted by the South Carolina Supreme Court concentrates too much on the former at the expense of the latter. The pattern of South Carolina's death sentences appear as arbitrary and capricious as those struck down by *Furman*.[311]

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310. *See* State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985) (victim suffered before dying), *cert. granted and judgment vacated*, ___ U.S. ___, 106 S. Ct. 1942 (1986); *Patterson*, 285 S.C. 5, 327 S.E.2d 650 (30 to 40 wounds to the head); State v. Adams, 279 S.C. 228, 306 S.E.2d 208 (defendant lay in wait for victim), *cert. denied*, 464 U.S. 1023 (1983); State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (murder committed maliciously and purposefully), *cert. denied*, 459 U.S. 932 (1982); State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981) (defendant planned and prepared murder), *cert. denied*, 458 U.S. 1122 (1982).

311. In *Copeland* the court alluded to the tension between individualized and consistent capital sentencing and how the necessary discretion in an individualized sentencing system could produce arbitrary results. The court noted that " '[m]istakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder.' " 278 S.C. at 597, 300 S.E.2d at 77 (quoting Gregg v. Georgia, 428 U.S. 153, 226 (1978) (White,

Assuming, *arguendo*, that the theory of proportionality review adopted by the court is reasonable, the issue becomes whether the court's model produces results that are consistent with its own philosophy.[312] In *State v. Adams* the court noted that South Carolina juries impose the death penalty "in only those cases where . . . the nature of the wrongful killing is such as to shake the conscience of the community."[313] To determine the deservedness of the death penalty in individual cases, the *Adams* court suggested it would look to jury behavior as an indicator of contemporary community mores. Reliance on jury behavior to provide substantive moral guidance has been a landmark of eighth amendment analysis.[314] The *Adams* court correctly used jury sentencing behavior as an indicator of contemporary standards of decency.

Unfortunately, although the South Carolina Supreme Court's theory of proportionality review suggests the maintenance of a link with the conscience of the community, that link is severed in practice, and the court stands isolated from expressions of societal standards of decency. In describing its methodology of proportionality review, the *Copeland* court stated that it would restrict its universe of similar cases to those in which a death sentence had been affirmed. Table 24 indicates that the court diligently has applied this methodology in practice. When it has complied with the statutory requirement to cite cases similar to the one under review, the court has *always* cited only previously affirmed death sentences. In these cases the *Copeland*

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J., concurring)).

312. For an explanation of the objective model, see *supra* note 264 and accompanying text.

313. 279 S.C. at 241, 306 S.E.2d at 215.

314. In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court noted that jury behavior played an important role in defining contemporary standards of decency and that capital juries "maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' " *Id.* at 519-20 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). The role of capital juries in reflecting societal norms was expressed by the *Gregg* plurality when it noted that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved" in administering the death penalty. 428 U.S. at 181. The plurality in *Coker* observed that "it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." 433 U.S. 584, 596 (1977).

court noted that "the jury has spoken unequivocally."[315]

The supreme court, however, cannot gauge the community's conscience if it restricts its review to only those cases in which a death sentence was imposed. If juries in South Carolina consistently reject a death sentence for a category of crime, the court will have no sense of the community's evolving rejection of capital punishment for that category. Rather, it will see the aberrant, capricious death sentences imposed for this crime which it will mistakenly take to reflect the conscience of the community. The court, thus, isolates itself from contemporary standards of decency and ultimately must rely on its own view of deserved punishment.[316]

In justifying its restriction of the universe of similar cases to affirmed death sentences, the *Copeland* court constructed and demolished a straw man. Without a period of experimentation, the court rejected outright all approaches to a broader universe of cases. The court claimed a broader universe would include "sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests."[317] The inclusion of acquittals, reversals and arrests in a comparative sentence review has not been considered seriously by those who suggest a more inclusive universe of cases.[318] The only reason not to include life sentences in the universe of cases is the administrative difficulty in compiling data. Yet, only by compiling this data can a reviewing court ascertain existing and evolving standards of decency. The court in *Copeland* failed to comprehend that, when a jury speaks for life, it too "has spoken unequivocally."[319]

### *G. Parameters of an Adequate System of Proportionality Review*

Before concluding this analysis of post-conviction capital sentencing, this Article suggests an empirical model of proportionality review that, with a modest investment of time, energy, and resources, could be administered in South Carolina. Skep-

315. 278 S.C. at 591, 300 S.E.2d at 74.

316. A similar point was made in Hubbard, Burry & Widener, *supra* note 143, at 440-45; *see also supra* note 221.

317. 278 S.C. at 591, 300 S.E.2d at 74.

318. *See, e.g.*, Goodpaster, *supra* note 213.

319. 278 S.C. at 591, 300 S.E.2d at 74.

tics may question the need for an extensive proportionality review in view of the United States Supreme Court's holding in *Pulley v. Harris*[320] that proportionality review is not a constitutional requirement of capital sentencing schemes. Nonetheless, this model is proposed to fulfill the statutory mandate that the state supreme court compare each death sentence to the penalty imposed in similar cases,[321] and to comply with the language of *Harris*.

Although an extensive proportionality review is not constitutionally required, South Carolina's death penalty statute still requires the supreme court to review each death sentence for excessiveness. Whether it undertakes to do so in a comparative or absolute sense, the court must make itself aware of the sentencing patterns of South Carolina juries in capital murder cases. The comparative approach would allow the court to determine if the death sentence being reviewed is aberrant in relation to the penalty imposed on similarly circumstanced defendants. Under the absolute approach to proportionality review, the court can monitor life and death sentences for capital murder and it can ascertain contemporary standards of decency.

In *Harris* Justice White, writing for the majority, observed that proportionality review is not constitutionally required, in part because "other checks on arbitrariness"[322] exist, such as the narrowing function of statutory aggravating circumstances. The South Carolina data, however, cast some doubt on the efficacy of these procedural reforms in reducing arbitrariness and discrimination to acceptable levels. If statutory schemes for the administration of capital punishment are "lacking in other checks on arbitrariness," then some kind of comparative proportionality review may be required.[323] The South Carolina Supreme Court can establish an administratively feasible, systematic procedure for comparative capital sentence review. It could begin to collect a data base consisting of all homicide indictments that included a statutory aggravating circumstance. The court could obtain in-

320. 465 U.S. 37, 44 (1984).

321. S.C. CODE ANN. § 16-3-25(C) (Law. Co-op. 1987).

322. 465 U.S. at 51. *See generally* Hubbard, *Reasonable Levels of Arbitrariness in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L.R. 1113 (1985).

323. 465 U.S. at 51.

dictment and charging information from the Office of the Attorney General, and the State Court Administrator's Office, and it could gather additional offense and offender data from the police incident and supplemental investigation reports. The court could get from the prosecution and defense bars brief, standardized questionnaires detailing facts of the cases, witnesses' testimony, and available evidence. If the case went to trial, the court could get a copy of the trial transcript. It could gather this information on all capital felonies that resulted in a murder conviction (or even a lesser conviction) either by trial or by guilty plea.

Such a monitoring of capital cases would not pose too prodigious a task for the research office of the state supreme court. During the time examined here, from June 8, 1977, until December 31, 1981, 135 capital murder cases resulted in a homicide conviction. Over this fifty-five month period, then, the court would have monitored an average of two and one-half cases per month. The amount of initial work required to implement and maintain a computerized data base should not be underestimated. Once the procedure is instituted, however, the time and resources expanded would decline. After a computerized case system is operational, the court easily could conduct an extensive comparative review and could keep in closer touch with prevailing capital sentencing standards, thereby maintaining an accurate awareness of the conscience of the community.

Finally, a comparative capital sentence review that includes both life and death sentences is a more reasonable resolution of the tension that exists between the principles of individualized and consistent capital sentencing. True to the United States Supreme Court's wishes in *Woodson* and *Lockett*, South Carolina juries could focus their attention on the unique features of the individual. With this discretion, juries could "speak unequivocally" in expressing societal standards of decency. The state supreme court could better apply contemporary values in the absolute theory of proportionality review *and* conduct a true comparative review, if appropriate. For a matter so grave as the lawful and just administration of capital punishment in South Carolina the effort seems worthwhile.

## VI. ACCEPTANCE OF EMPIRICAL DATA ON ARBITRARINESS AND DISCRIMINATION IN CAPITAL SENTENCING BY THE COURTS

The suggestion in this Article that the administration of the death penalty in South Carolina produces both discriminatory and arbitrary treatment for capital defendants is of more than idle academic interest. Given the pronouncement in *Furman* that a capital sentencing system must provide evenhanded justice, empirical evidence demonstrating the failure of procedural reforms to achieve this result *in application* could provide the basis of court challenges. The question of the constitutionality of post-*Furman* capital sentencing schemes was not definitively answered in *Gregg*, since it held that revised capital statutes were valid on their face. The court in *Gregg* did not state that these statutes were unreviewable, only that they *promised* to remedy the infirmities identified in *Furman*. In addition to any federal constitutional claims, empirical evidence that a state's capital sentencing system is arbitrary and discriminatory could form the basis of a state constitutional challenge if the state statutes require evenhanded administration of death sentences. Not surprisingly, then, data from this and other studies have been used to challenge the constitutionality of procedurally reformed, post-*Furman* capital punishment statutes. This section reviews briefly the reception of this statistically based claim in the South Carolina Supreme Court. It then reviews similar federal challenges which recently culminated in the landmark United States Supreme Court decision of *McCleskey v. Kemp*.[324]

### *A. The Treatment of Arbitrariness and Discrimination Claims in the South Carolina Supreme Court*

The expectation that the South Carolina Supreme Court would be unresponsive to defendants' claims of arbitrary and discriminatory treatment was reasonable in the first challenge to the state's new statute in *State v. Shaw*.[325] In arguing that the statute was per se invalid, appellants Shaw and Roach contended that the procedural reforms of the statute left untouched the considerable discretion available to prosecutors in charging

324. ___ U.S. ___, 107 S. Ct. 1756 (1987).
325. 273 S.C. 194, 255 S.E.2d 799 (1979).

cases and bringing them to trial. They had no data to support this contention and the court, therefore, could not address the empirical issue. In responding to this claim, however, the court displayed no sensitivity to prosecutors' continued unregulated and unreviewable discretion and simply noted that "[t]his issue was decided adversely to appellants by *Gregg* and does not merit further consideration by this Court."[326] Unlike *Gregg*, then, *Shaw* failed to suggest that the court would later consider the possibility that the procedural reforms failed in their *application.*

The court did have an opportunity to review and comment on empirical data in *Thompson v. Aiken.*[327] In *Thompson* the appellant presented statistical evidence compiled by the senior author of this study which indicated that a risk of discriminatory treatment by South Carolina prosecutors existed for defendants who killed white victims. Although the data was not as complex or rigorous as that reported in this Article, the statistical analysis in *Thompson* did include both unadjusted racial comparisons and comparisons made after controlling for several legally relevant variables. Nevertheless, other than noting that petitioner relied upon "gross statistics and probabilities," that he "elected not to consider various intangible factors," and that he "provided no direct testimony to support his charge,"[328] the court did not comment directly on the validity of the proffered statistical evidence. This silence was probably intentional since the *Thompson* court stated emphatically that *no* statistical evidence of statewide practices or patterns would be sufficient to demonstrate discrimination. The court stated: "In the final analysis, the allegation of statewide 'patterns' raised by a specific capital defendant has no real bearing upon his individual guilt or innocence nor upon the correctness of any sentence imposed in his particular case."[329] The *Thompson* court boldly warned of the " 'unwise depletion of the obviously limited public funds available for the defense of indigents' "[330] that could result from extensive statistical analysis. It also appeared willing to forestall

326. *Id.* at 204, 255 S.E.2d at 804.
327. 281 S.C. 239, 315 S.E.2d 110 (1984).
328. *Id.* at 241, 315 S.E.2d at 111.
329. *Id.*
330. *Id.* (quoting State v. Truesdale, 278 S.C. 368, 371, 296 S.E.2d 528, 529 (1982)).

further challenges in this area by recommending "to the bench and bar that judicial resources be applied to more fruitful endeavors."[331]

The South Carolina Supreme Court, then, has not been receptive to statistically based claims of racial discrimination and arbitrariness that were directed against the decisions of prosecutors and those based upon general statewide patterns. In its only full discussion of the matter the court performed two tasks. It defined the evidence necessary to make a racial discrimination claim and attempted to foreclose claims based on a statistical analysis of statewide patterns. The court in *Thompson* presaged federal constitutional law in suggesting that evidence of racial discrimination and arbitrariness must pertain to the specific case at hand.[332]

Given this framework, claims of discriminatory *sentencing* based upon a statistical analysis of statewide patterns, such as that presented in this Article, would probably face a similar fate. Although the court has not been confronted with a challenge of arbitrary sentencing based on statistical evidence, the court's opinions suggest that such efforts would not be fruitful. To demonstrate that a death sentence is arbitrary, an appellant would have to show that the imposed death sentence is excessive, given the penalty in comparable crimes. This would be accomplished best by an extensive proportionality review that includes comparable cases resulting in both life and death sentences. The state supreme court, however, has steadfastly refused to adopt a broad universe of cases in its review of death sentences.[333] In *Copeland* the court made clear its intention to include in its universe of cases only affirmed death sentences.[334] Again presaging the United States Supreme Court's position, the court has adopted the position that a death sentence is pre-

331. *Id.* The court also appeared unwilling to interfere with what it deemed the executive power of prosecutors under state law. *Id.* at 242, 315 S.E.2d at 111. In *State v. Yates*, the court opined that "[i]t would be error for the trial judge to tell a Solicitor how to determine whether the death penalty should be sought. This is the prerogative of the Solicitor." 280 S.C. 29, 36, 310 S.E.2d 805, 809 (1982), *cert. denied*, 462 U.S. 1124 (1983), *cert. granted and judgment vacated sub nom.* Yates v. Aiken, 474 U.S. 896 (1985); *see also* State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, *cert. denied*, 444 U.S. 957 (1979).

332. *See* Part VI, Section C *infra* p. 401.

333. See the discussion of the state supreme court's theory and practice of proportionality review in Part V, *supra* pp. 335-95.

334. 278 S.C. 572, 591, 300 S.E.2d 63, 74 (1982), *cert. denied*, 460 U.S. 1103 (1983).

sumptively valid as long as it rests on a legitimate aggravating circumstance.

### *B. The Treatment of Arbitrariness and Discrimination Claims in Federal Courts*

The volume of federal law and commentaries on each aspect of capital jurisprudence is prodigious, and only the briefest of reviews is possible here.[335] Prior to the Supreme Court's resolution of the issue in *McCleskey v. Kemp*,[336] federal circuit courts adopted various and inconsistent positions regarding statistical evidence of racial discrimination and arbitrariness in state capital punishment practices. Post-*Furman* evidence was first challenged before the Fifth Circuit Court of Appeals in *Spinkellink v. Wainwright*.[337] In raising both eighth and fourteenth amendment claims, the petitioner in *Spinkellink* presented statistical evidence that killers of whites were more likely to be sentenced to death than were killers of blacks. The quality of the statistical evidence presented in this case was marginal because few statistical controls for nonracial variables were used. In denying both claims, the court held that the facial validity of Florida's statute precluded an eighth amendment issue, and that, for a fourteenth amendment claim to succeed, the defendant would have to prove directly a discriminatory intent or purpose. Although the issue is not entirely clear, the court, which addressed the validity of the statewide statistical data, did not suggest that the appellant had to demonstrate an intent to discriminate in his particular case to win his fourteenth amendment claim. In a later Fifth Circuit opinion, *Smith v. Balkcom*,[338] the court interpreted the *Spinkellink* decision to mean that statistical evidence of general statewide patterns could be used to infer discriminatory intent. The court reasoned that "[i]n some instances, circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they

335. For a review of some of these issues, see Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 17 U.C. DAVIS L. REV. 1275 (1984), and Gross & Mauro, *supra* note 13, at 110-26.

336. ___ U.S. ___, 107 S. Ct. 1756 (1987).

337. 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

338. 671 F.2d 858 (5th Cir.) (*modifying* Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981)), *cert. denied*, 459 U.S. 882 (1982).

are the product of a racially discriminatory intent or purpose."[339] The burden of proof required was quite high, however, since the evidence apparently had to rule out all competing explanations for any observed racial disparities.[340]

Other federal circuits have adopted more stringent tests for discriminatory intent. A less complete and sophisticated version of the analyses reported in this Article were presented to the Fourth Circuit in *Shaw v. Martin*.[341] As in *Spinkellink* and *Wainwright*,[342] the issue in *Shaw* was the allegedly discriminatory decisions made by prosecutors in seeking the death penalty against defendants who killed whites. In rejecting the statistical argument, the Fourth Circuit observed that the study "did not adequately compare murders of similar atrocity."[343] This ruling appeared to place a crippling requirement of case similarity on those trying to demonstrate discriminatory intent by suggesting that a proper approach would be to "show a pattern of incidents where, for example, black and white young women of tender years have been kidnapped, raped, murdered, and mutilated, and the prosecutor has prosecuted only the murder of the white girl."[344]

These federal rulings suggest a common theme: evidence of discriminatory intent could be inferred from statistical data on general statewide patterns. In each case, the petitioners failed to meet this burden of proof because the statistical analyses which formed the basis of the claim of discriminatory intent were methodologically deficient because they left "untouched countless racially neutral variables."[345] A more definitive resolution of this issue would hinge on a more complete set of data. The issue

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339. *Id.* at 859.

340. "Only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice." Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983).

341. 733 F.2d 304 (4th Cir.), *cert. denied*, ___ U.S. ___, 105 S. Ct. 230 (1984).

342. *See supra* notes 248 and 250.

343. 733 F.2d at 312.

344. *Id.* A requirement of similar specificity was suggested in Prejean v. Blackburn, 743 F.2d 1091 (5th Cir. 1984), in which the defendants were required to show that "for murders of peace officers engaged in their lawful duties, juries in these two districts of Louisiana recommended death sentences only, or more often, against blacks, young or old, whose victims were white than for non-white victims." *Id.* at 1102.

345. Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 882 (1982).

was eventually resolved in *McCleskey v. Kemp*.[346]

### C. McCleskey v. Kemp *and the Supreme Court's Analysis of Discrimination and Arbitrariness Evidence in Capital Sentencing Systems*

In a federal habeas corpus petition filed in the Federal District Court for the Northern District of Georgia, Warren McCleskey presented statistical evidence of statewide disparity in the administration of capital punishment in Georgia's capital sentencing system. This evidence consisted of a multi-year study by Baldus which suggested that, even with over two hundred legally relevant factors controlled, killers of whites in Georgia were significantly more likely both to have the death penalty requested and imposed.[347] The district court was not convinced by McCleskey's statistical argument. The court discussed and critiqued methodological features of Baldus's work at great length. Interestingly, the court did not criticize the Baldus study because not enough racially neutral factors were considered, but instead rejected the statistical argument and McCleskey's claim on more methodologically arcane grounds.[348] Before conducting its review of the statistical issues, the district court observed that McCleskey's eighth amendment claim was foreclosed by *Spinkellink* and that victim-based discrimination was best pursued as a violation of the due process clause.

The Eleventh Circuit Court of Appeals reviewed the district court's rejection of McCleskey's claim.[349] It noted that McCles-

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346. ___ U.S. ___, 107 S. Ct. 1756 (1987).

347. McCleskey v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984), *rev'd on other grounds sub nom.* McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), *aff'd in part*, ___ U.S. ___, 107 S. Ct. 1756 (1987). Baldus presented several forms and derivations of his analyses. This included analyses of statewide data and of data from the jurisdiction in which McCleskey's crime occurred (Fulton County, Georgia).

348. The court found that: (a) Baldus's regression models were unreliable because they failed to explain a sufficient amount of variation in the outcome variable to support an inference of discrimination (a deficient $R^2$ problem); (b) the variables were fatally tainted with measurement error ("errors in variable" problem); and (c) many of the explanatory variables were themselves correlated, which distorted the estimation of the regression coefficients (a multicollinearity problem). *Id.* at 354-64. Unfortunately, this excursion by the court into the realm of statistical analysis produced either gross exaggeration and misunderstanding, or outright errors. *See* Gross, *supra* note 335.

349. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), *aff'd in part*, ___ U.S. ___, 107 S. Ct. 1756 (1987).

key stated an eighth amendment claim because the Georgia statute was deemed only facially valid in *Gregg*, and remained open to empirical inspection of its application. Rather than reviewing the statistical conclusions of the district court, the court of appeals assumed the validity of the Baldus data and addressed only its sufficiency. The burden of proof required was quite high: petitioner had to demonstrate proof of a "disparate impact . . . so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination—*i.e.*, race is intentionally being used as a factor in sentencing—can be presumed to permeate the system."[350] In a lengthy discussion, the court rejected Baldus's conclusion of a racially discriminatory effect. It concluded that the magnitude of the racial disparity identified by the statistical analyses was not sufficiently great "to overcome the presumption that the statute is operating in a constitutional manner."[351] Although the court noted some racial variation in outcomes, it characterized these as "marginal" and concluded that the data "confirms rather than condemns" Georgia's capital sentencing system.[352]

In its most recent Term the United States Supreme Court directly addressed the issue of racial discrimination and arbitrariness in state capital sentencing systems. In *McCleskey v. Kemp*[353] the Court in a 5-4 decision provided a strict rule for determining the validity of capital defendants' claims of racial discrimination and rejected the notion that a duly authorized capital sentence could be invalidated because it was comparatively excessive. *McCleskey* is particularly important because the Court had before it the most complete and comprehensive capital sentencing study ever assembled, far more thorough than the present Article.

In an opinion authored by Justice Powell, the Court affirmed the Eleventh Circuit's rejection of McCleskey's eighth and fourteenth amendment claims in a way that virtually precludes any further challenges against the death penalty on grounds of relative disparity. Like the Eleventh Circuit, the Court did not evaluate the adequacy of the Baldus study, but

350. *Id.* at 892.
351. *Id.* at 897.
352. *Id.* at 899.
353. ___ U.S. ___, 107 S. Ct. 1756 (1987).

instead assumed its statistical validity.[354] Rejecting McCleskey's equal protection argument, Justice Powell wrote that, because of the unique nature of the sentencing decision, traditional models of statistical proof—that an intent to discriminate can be demonstrated by a showing of a disparate impact for which racially neutral variables cannot account—are not applicable. To demonstrate an equal protection violation, Powell noted that the petitioner would have to "prove that the decision makers in *his* case acted with discriminatory purpose."[355] This decision renders moot statistical claims of sentencing disparity based on the type of analysis used by Baldus and in this Article. Despite well-established jurisprudence that allowed defendants to prove allegations of discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose,"[356] the majority of the *McCleskey* court rejected this traditional approach in favor of a more restrictive test.

In reviewing McCleskey's eighth amendment claim that his sentence was comparatively excessive under the Georgia scheme, the majority rejected the idea that the claim is even a matter for constitutional scrutiny: "The Constitution is not offended by inconsistency in results based on the objective circumstances of

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354. *Id.* at ___, 107 S. Ct. at 1766 n.7. In dissent, Justices Blackmun and Stevens would have remanded the case to the court of appeals for a review of the district court's factual findings regarding the validity of Baldus's study. *Id.* at ___, 107 S.Ct. at 1806. One can only speculate about the Supreme Court's reasons for not reviewing the district court's factual findings. The Court may have believed that the district court's findings that the Baldus data were fatally flawed were simply wrong. Like the court of appeals, the Supreme Court may have been sufficiently impressed with the quality of Baldus's data and analysis to presume its validity. This does not explain, however, why it did not follow regular procedure and remand to the court of appeals for a review of the factual issues. Had the Court found Baldus's data statistically inadequate, lower courts probably would have been forced to address the issue at a later time with another study that remedied the identified deficiencies of the Baldus study. This, however, would have introduced additional delays into a system that the Court has tried to streamline. In presuming the data valid and dealing instead with the merits of the issues, the Court precluded this from happening.

355. *Id.* at ___, 107 S.Ct. at 1766 (emphasis in original). Statistical studies of disparate impact have been used frequently and accepted as proof of intent to discriminate in studies of jury selection and in Title VII cases. In spite of the traditional utility of statistical studies, Justice Powell felt they had little probative value in capital sentencing cases because: (1) sentencing decisions are made by distinct and "unique" decision making bodies (petit juries), (2) sentencing decisions are based on "innumerable" and idiosyncratic factors, and (3) criminal justice decision makers would have little opportunity to explain or rebut presented evidence of disparity. *Id.* at ___, 107 S.Ct. at 1767-68.

356. Batson v. Kentucky, ___ U.S. ___, 106 S. Ct. 1712, 1721 (1986).

the crime."[357] The Court emphasized the position it took in *Zant v. Stephens*,[358] that a death sentence is immune to federal constitutional review if it is legitimately based on an aggravating circumstance. The Court showed no interest in comparative review and pronounced the excessiveness test which only inquires whether the sentence was authorized by state statute.[359]

Finally, the Court in *McCleskey* addressed appellant's claim that the Georgia capital sentencing system was discriminatory *in application*. Justice Powell, who was unconvinced by the statistical evidence presented, stated that, "[a]t most, the Baldus study indicates a discrepancy that appears to correlate with race."[360] He concluded that, given the central role of discretion in capital sentencing and the de jure existence of procedural rules that narrow the range of such discretion, "the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."[361]

The implications of the *McCleskey* decision are profound and unsettling for those who wish to challenge state capital sentencing systems on eighth or fourteenth amendment grounds. As a result of this decision, capital defendants who claim that their death sentences were discriminatory or arbitrary face an exacting burden of proof. If a defendant's sentence rests on a valid aggravating circumstance, the *McCleskey* court would hold that they have no federal constitutional claim of comparative excessiveness under the eighth amendment. To demonstrate a case of racial discrimination under the cruel and unusual punishment clause capital defendants would have to show a degree of racial

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357. ___ U.S. at ___, 107 S. Ct. at 1775 n.28.

358. "These two findings [of valid aggravating circumstances] adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." 462 U.S. 862, 879 (1983). Commenting on this in *Pulley v. Harris*, Justice White noted that, "we relied on the jury's finding of aggravating circumstances, not the State Supreme Court's finding of proportionality, as rationalizing the sentence." Pulley v. Harris, 465 U.S. 37, 50 (1984) (footnote omitted).

359. ___ U.S. at ___, 107 S. Ct. at 1774.

360. *Id.* at ___, 107 S. Ct. at 1777.

361. *Id.* at ___, 107 S. Ct. at 1778 (footnote omitted). Powell raised two further issues regarding the denial of McCleskey's claim of racial disparity. He suggested that a successful challenge in this case would open the criminal justice system to a multitude of claims of other forms of discrimination (*e.g.*, gender, physical appearance). He also observed that evidence of the type presented by McCleskey would be more appropriate for legislative consideration.

disparity greater than that found in the Baldus data, while simultaneously controlling for racially neutral variables that are both known and those that may "defy codification."[362] To mount successfully an equal protection claim, those sentenced to death must demonstrate directly that decision makers intentionally discriminated against them. They thus would have to meet a burden of proof more demanding than the burden required of persons denied equal employment opportunities.

## VII. CONCLUSION

This review of the administration of capital punishment in South Carolina during the first few years of the state's procedurally reformed statute calls into question the basic fairness of the statute's administration. Prosecutors' decisions to seek the death penalty are, in part, based upon the egregiousness of the offense and the criminal history of the defendant. When these facts are controlled, however, prosecutors' decisions to seek a death sentence are significantly influenced by the race of both the victim and offender. Further, this racial effect varies from urban to rural jurisdictions. The data reveal that for similarly aggravated cases prosecutors are more likely to seek death in a white-victim than in a black-victim homicide, unless it is especially heinous. The multivariate model of prosecutors' charging decisions was fairly precise, accurately predicting approximately 80% of cases in which a death sentence was sought. The data indicate that, given the considerable discretion granted to them, South Carolina prosecutors operated with a race-specific definition of homicide severity and were more tolerant of black-victim than white-victim killings.

As a result of this prosecution-based selection process, black-victim cases resulting in a death penalty request were significantly more aggravated than the "average" black-victim killing. This was not true for white victim homicides. This "sample selection bias" was instrumental in creating the somewhat aberrant results observed at the sentencing stage, at which white killers and killers of blacks were more likely to be sentenced to death. Only twenty-six death sentences were imposed during the

362. *Id.* at ___, 107 S. Ct. at 1777.

period covered by this study, however, and in only six of those was the victim black. In addition, homicides of black victims had substantially lower conviction rates than those of white victims, particularly when the offender was also black.

Finally, the arbitrary infliction of capital punishment was empirically examined by comparing each case in which the death penalty was imposed with a group of cases with similarly circumstanced defendants. Three different methodologies were used to determine which case would be considered similar and the results were consistent across the methods. A few death sentences were imposed for crimes so egregious that nearly all comparable crimes also resulted in a death sentence. In about one-third of the death sentences, however, the frequency of death sentences in the comparable group was less than 20%. A lesser sentence for these crimes was probably not an isolated act of mercy, and a death sentence probably was comparatively excessive. These offenses tended to be single-victim armed robbery-murders or rape-murders that involved no substantially excessive brutality.

The examination of state supreme court review practices showed that the court did not vacate a single death sentence as comparatively excessive although the empirical analyses consistently indicated that at least one-third were arguably excessive. The analysis of the fifteen state supreme court opinions affirming the death sentences imposed during the study period revealed that the court conducted a proportionality review of very limited scope. Confining its search for comparable cases to previously affirmed death sentence cases, the state supreme court has conducted an absolute proportionality review by which it determines whether a death sentence was deserved given the idiosyncratic features of the offense and offender. Although this individual culpability theory of proportionality review is consistent with one principle of capital sentencing—individual sentencing—the empirical analysis showed that it failed to achieve an equally important principle—consistent capital sentencing. Furthermore, by excluding all but affirmed death cases the court failed to consider those instances in which the jury speaks for life imprisonment. As a result, the court's theory and practice of proportionality review is isolated from contemporary standards of decency and changing moral sentiments. The implementation of an administratively workable system of proportionality review

suggested here, which would include in the universe of cases both life and death sentences, would avoid these shortcomings of the court's present practices.

This extensive analysis of the first four years of South Carolina's procedurally reformed death penalty statute reveals glaring inadequacies in both theory and practice. Although at times rationally and fairly administered, substantial instances of both racially based discrimination and arbitrariness remain. A question remains of how these findings may be generalized. The data suggesting the existence of racial discrimination and arbitrariness presented here are based upon homicides that occurred during the first few years of the administration of the death penalty in South Carolina. One could argue that this was a period of experimentation and that procedural reforms in the jurisprudence of capital sentencing since 1981, at both the state and federal level, have remedied these vestiges of inequality. Although intuitively appealing, there is little basis on which to maintain such a belief. In fact, a stronger case can be made that, if anything, arbitrary and discriminatory treatment in South Carolina's capital sentencing system can only be expected to worsen.

Two lines of evidence, one legal and one empirical, support this allegation. The legal evidence shows that procedural controls over the exercise of discretion have weakened since 1981. The United States Supreme Court has retreated in its efforts to surround state administered capital punishment with formal legal rules.[363] The majority of the Court in *Zant v. Stephens*[364] rejected the position it appeared to adopt in *Gregg*, that aggravating circumstances are designed to guide discretion at all levels of decision making in a state's capital punishment system. Instead, in adopting its "threshold theory," the Court held that the only function of statutory aggravating circumstances is to narrow the class of murderers subject to capital punishment. Within this sub-pool of statutorily narrowed death-eligible murder cases, the jury is given full and unguided discretion in selecting which individuals will live and which will die. In *Pulley v. Harris*,[365] the Court held that a critical check on comparatively

363. For a more detailed discussion of the Supreme Court's reversal in its doctrinal reform, see Weisberg, *supra* note 9.

364. 462 U.S. 862 (1984).

365. 465 U.S. 37 (1984).

excessive death sentences—proportionality review—was not constitutionally required as long as statutory procedures adequately guided the sentencer's discretion. Finally, in *McCleskey v. Kemp*[366] the Court concluded that capital defendants "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty" so long as the sentence is authorized by state law. Since 1981, then, the Supreme Court apparently has gone out of the death penalty business by giving up its earlier attempt to regulate state capital punishment systems. If states were reluctant to channel and monitor scrupulously discretion in the administration of capital punishment before *Zant*, *Pulley*, and *McCleskey*, there is very little to compel them to do so now.

Capital defendants in South Carolina can be even less optimistic about developments in state law. The state supreme court has rejected defendants' claims of racial discrimination at the hands of the prosecutor.[367] The court's desert-based model of proportionality review precludes any consideration of comparative excessiveness. The court's decisions affirming death sentences since 1981 provide no more clear or consistent explanation of the role of proportionality review in state law than do older decisions. In addition, the court is yet to vacate a death sentence on the grounds that it was influenced by prejudice or that it was comparatively excessive.

Finally, some empirical evidence suggests that at least racial discrimination persists in the administration of the death penalty in South Carolina. This Article shows that prosecutors' discretionary decisions to seek a death sentence occur at a particularly critical stage. Prosecutors have great discretion because the decision to seek a death sentence has not been subject to judicial review.[368] Between 1977 and 1981, prosecutors frequently exercised their discretion by seeking death in only one in three death-eligible cases. In addition, the decision to seek a death sentence was more than twice as likely to occur if a white rather than a black was killed (Table 1).

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366. ___ U.S. ___, 107 S. Ct. 1756, 1774 (1987) (emphasis in original).

367. Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984).

368. State v. Yates, 280 S.C. 29, 36, 310 S.E.2d 805, 807 (1982), *cert. denied*, 462 U.S. 1124 (1983), *cert. granted and judgment vacated sub nom.* Yates v. Aiken, 474 U.S. 896 (1985).

Table 25 contains data for two additional years, 1982 to 1983, on prosecutors' decisions to seek the death penalty. Although more detailed information on these cases from police and corrections files was not gathered, the data in Table 25 provide the basis for a useful comparison with the data in Table 1. Table 25 suggests that prosecutors exercised their discretion to seek a death sentence more between 1982 and 1983 than in previous years. From 1971 to 1981, prosecutors sought a death sentence in approximately 38% of all felony homicides. From 1982 until 1983, they sought a death sentence in approximately 23% of the felony murder cases. Perhaps because of their increased understanding of when juries are willing to impose a sentence of death, prosecutors in the state were becoming more selective. Table 25 also reveals, however, that greater selectivity did not produce greater evenhandedness. Precisely the same pattern of racial effects observed between 1977 and 1981 persisted in this later two-year period. In fact, the unadjusted racial effects for the 1982-83 study were even greater in magnitude than the effects for earlier years. As before, prosecutors' decisions to seek a death sentence were made independent of the offender's race. The victim's race was, however, a crucial determining factor.

Table 25: Probability of Prosecutor Seeking the Death Penalty for Felony Homicides in South Carolina During 1982 - 1983 by Race of Offender and Victim

| | | Cases | Probability | Ratio |
|---|---|---|---|---|
| Death Penalty Sought for: | White Offender | 14/58 | .241 | 1.05 |
| | Black Offender | 22/96 | .229 | |
| | White Victim | 31/84 | .369 | 5.19 |
| | Black Victim | 5/70 | .071 | |
| | Black Kills Black | 5/67 | .075 | |
| | Black Kills White | 18/29 | .621 | |
| | White Kills Black | 0/3 | .000 | |
| | White Kills White | 13/55 | .236 | |
| | Black Kills Black | 5/67 | .075 | 4.75 |
| | All Others | 31/87 | .356 | |
| | Black Kills White | 18/29 | .621 | 4.31 |
| | All Others | 18/125 | .144 | |
| | Black Kills Black | 5/67 | .075 | 8.28 |
| | Black Kills White | 18/29 | .621 | |

Table 25 reports that prosecutors were five times more likely to seek a death sentence for the killing of a white than of a black. Approximately 37% of white-victim killings, but less than 10% of black-victim killings resulted in a request for a death sentence. There was considerable disparity in the fate of black defendants. Blacks who killed whites were over eight times more likely to face a death sentence than blacks who killed other blacks. To an even greater degree than before, then, prosecutors reserved the state's most severe sanction for black-on-white homicides. These unadjusted racial effects can be expected to diminish somewhat when statistical controls are made for differences in white- and black-victim killings.

In view of the South Carolina Supreme Court's reluctance to consider seriously the issues raised by defendants' claims of discriminatory and excessive death sentences, the prospect for an evenhanded administration of the death penalty in South Carolina seems remote. Furthermore, rather than a temporary

aberration produced by a lack of experience with a new capital punishment law, the data presented here suggest a darker picture of a state still mired in its history of racial inequality.

## Technical Appendix

*Regression Procedures*

Multiple linear regression analysis is a statistical procedure frequently used in legal studies for determining the simultaneous effect of several factors (independent or explanatory variables) on a response. For example, a regression equation with two explanatory variables, $x_1$ and $x_2$, is depicted below:

$$Y_i = \beta_0 + \beta_1 x_{i1} + \beta_2 x_{i2} + \epsilon_i \qquad i = 1, 2, ..., N$$

Here $Y_i$ is the value of the response for the ith observation, $\beta_0$ is the intercept, the other $\beta_i$'s represent theoretical coefficients for the two independent variables, and $\epsilon_i$ represents an error term that is composed of all other factors that affect the response other than those explicitly included in the equation. Usually it is assumed that the N error terms, $\epsilon_1$, $\epsilon_2$, ..., $\epsilon_N$, are independent, normally distributed random variables each with mean $\emptyset$ and the same variance. Thus, each error term is continuous. The regression coefficients, $\beta_0$, $\beta_1$, and $\beta_2$, are estimated using the method of ordinary least squares (OLS). Their estimates are denoted by $b_0$, $b_1$, and $b_2$ respectively. If $\hat{y}_i$ denotes the predicted ith response derived from the OLS regression equation, then:

$$\hat{y}_i = b_0 + b_1 x_{i1} + b_2 x_{i2}$$

The difference between this predicted response and the ith observed response, called the ith residual, is given by:

$$e_i = y_i - \hat{y}_i = y_i - b_0 - b_1 x_{i1} - b_2 x_{i2}$$

In ordinary least squares estimation, estimates for $\beta_0$, $\beta_1$, and $\beta_2$ are found which minimize the sum of the squares of the residuals. That is, $b_0$, $b_1$, and $b_2$ are found such that:

$$\sum_{i=1}^{N} e_i^2 = \sum_{i=1}^{N} (y_i - \hat{y}_i)^2 = \sum_{i=1}^{N} (y_i - b_0 - b_i x_{i1} - b_2 x_{i2})^2$$

is at a minimum. When the normality assumptions are met, the OLS estimators are efficient and are the best linear unbiased estimators (BLUE) for $\beta_0$, $\beta_1$, and $\beta_2$.

When the response variable takes on only two values, as in predicting whether the prosecutor does or does not seek the death penalty, then the usual regression assumptions are not met. In particular, when the response variable is restricted to two values, 0 (no death request) and 1 (death request), then $\epsilon_i$ itself can assume only two values, $-(\beta_0 + \beta_1 x_{i1} + \beta_2 x_{i2})$ or $1 - (\beta_0 + \beta_1 x_{i1} + \beta_2 x_{i2})$. Thus, not only is $\epsilon_i$ not normally distributed, but it is not even continuous. Furthermore, under these conditions the variances of the error terms are not the same, but vary systematicaly. Thus, in the case of a dichotomous response, multiple linear regression techniques are not appropriate.

*Logistic Regression Procedures*

To overcome the problems mentioned above, a logistic model is used rather than a multiple linear regression model. This study finds that nine variables are associated with prosecutors' decision to seek the death penalty. It is assumed that P, the probability that the prosecutor will seek the death penalty, is a nonlinear function of these nine explanatory variables. This function, called the logistic function, is given by:

$$P = E[Y] = \frac{1}{1 + e^{-\underline{x}'\underline{\beta}}}$$

where E [Y] denotes the average value of the dichotomous variable Y discussed earlier and

$$\underline{x}'\underline{\beta} = \beta_0 + \beta_1 x_1 + \beta_2 x_2 + \ldots + \beta_9 x_9.$$

To linearize this model, the odds ratio

$$R = \frac{P}{1 - P}$$

is used. Taking natural logarithms, it is seen that:

$$\begin{aligned} \text{Ln (R)} = \quad L &= \ln P - \ln (1-P) \\ &= -\ln(1 + e^{-\underline{x}'\underline{\beta}}) - [\ln (e^{-\underline{x}'\underline{\beta}}) - \ln (1 + e^{-\underline{x}'\underline{\beta}})] \\ &= \underline{x}'\underline{\beta} \end{aligned}$$

In expanded form,

$$\text{Ln}(R) = \beta_0 + \beta_1 x_1 + \beta_2 x_2 + \ldots + \beta_9 x_9$$

Assume that R combinations of x values are available with multiple observations taken for each combination. Then $P_{i,T}$ the true probability that the death penalty is sought under the $i$ combination is estimated by $\overline{P}_i$, the average of all the responses for this combination. The logistic regression model is written in terms of these sample means as

$$\text{Ln}\left(\frac{\overline{P}i}{1-\overline{P}_i}\right) = \beta_0 + \beta_1 x_{i\,1} + \beta_2 x_{i2} + \ldots + \beta_9 x_{i9} + \epsilon_i$$

Weighted least squares is used to estimate the model parameters of this linear model. These, in turn, are used to estimate a future probability that the death penalty is sought for a given set of x values by using the equation:

$$\hat{P} = \frac{1}{1 + e^{-\underline{x}'\underline{b}}}$$

in which $\underline{x}'\underline{b} = b_0 + b_1 x_1 + b_2 x_2 + b_3 x_3 + \ldots + b_9 x_9$.